UNITED STATES DEPARTMENT OF AGRICULTURE

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PREFATORY NOTE

Agriculture Decisions is an official publication designed to facilitate access to decisions and orders issued by the Secretary of Agriculture, or officers authorized to act in his stead, in matters arising under laws administered by the Department of Agriculture.

The published decisions principally consist of those issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the Federal Register and, therefore, they are not included in Agriculture Decisions.

Consent decisions entered subsequent to December 31, 1986 are no longer published. However, a list of these decisions is included. (53 F.R. 6999, March 4, 1988.) The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Decisions are published in order of their issuance or finality under the principal statutes administered by the Department, which are the Agricultural Marketing Act of 1946 (7 U.S.C. § 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. § 601 *et seq.*), Animal Quarantine and Related Laws (21 U.S.C. § 111 *et seq.*), the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. § 601 *et seq.*), the Grain Standards Act (7 U.S.C. § 1821 *et seq.*), the Horse Protection Act (15 U.S.C. § 1821 *et seq.*), the Packers and Stockyards Act, 1921, (7 U.S.C. § 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. § 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. § 151 et seq.), the Poultry Products Inspection Act (21 U.S.C. § 451 et seq.), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. § 151 *et seq.*).

The published decisions may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision number. Prior to 1942 decisions were identified by docket and decision numbers, e.g., D-578; S. 1150 and the use of such references generally indicates that the decision has not been published in Agriculture Decisions.

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In re: A. B. GORDON AND CHARLES W. BOLTON.
A.Q. Docket No. 289.
Order filed July 10, 1989.

Order issued by Victor W. Palmer, Acting Chief Administrative Law Judge.

DISMISSAL

Upon consideration of complainant's Motion To Dismiss, and *for good cause found,* the complaint in the above captioned proceeding is hereby dismissed.

PACKERS AND STOCKYARDS ACT

DISCIPLINARY DECISIONS

In re: CHARLEY CHARTON.

P & S Docket No. 6782.

Decision and order filed July 13, 1987.

Dealer—Bonding requirement—Suspension of registration—Civil penalty—Failure to file an answer.

Summary: The Judicial Officer affirmed Acting Chief Administrative Law Judge Palmer's order requiring respondent to cease and desist from engaging in business without an adequate bond or its equivalent, suspending respondent's registration until he complies with the bonding requirements, and assessing a $500 civil penalty. Respondent's failure to file an answer constitutes an admission of the allegations of the complaint and a waiver of hearing.

Sharlene W. Lassiter, for complainant

Respondent, pro se.

Initial Decision issued by Victor W. Palmer, Acting Chief Administrative Law Judge

Decision and Order by Donald A. Campbell, Judicial Officer

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*) An initial Decision and Order was filed on May 20, 1987, by Acting Chief Administrative Law Judge Victor W. Palmer (ALJ), ordering respondent to cease and desist from engaging in business without filing and maintaining an adequate bond or its equivalent. The order also suspends respondent as a registrant under the Act until he complies with the bonding requirements, and assesses a $500 civil penalty.

On June 25, 1987, respondent appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[2] The case was referred to the Judicial Officer for decision on July 6, 1987.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case, except that the effective date of the order is changed in view of the appeal, and the method of paying the civil penalty is specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

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[1] *See generally* Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 3 (1981 and 1986 Cum. Supp.), and Carter, *Packers and Stockyards Act*, in 10 Harl, Agricultural Law, ch. 71 (1980)

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 C F.R. § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Charley Charton, hereinafter referred to as the respondent, is an individual whose business mailing address is P.O. Box 133, Ola, Arkanasa 72853.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

2. Respondent was notified by certified mail in 1981 that the surety bond he maintained to secure the performance of his livestock obligations under the Act would terminate on May 28, 1981. Respondent was further notified that if he continued his livestock operations under the Act without providing adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)),

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[2] The position of Judicial Officer was established pursuant to the Act of April, 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U. S. C. app at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962–January 1971).

and sections 201.29 and 201.30 of the regulations. Further, respondent was notified again of the bonding requirements by certified letter received October 25, 1985, and was again informed that continued operations without proper bond coverage would be in violation of the Act and the regulations. Notwithstanding such notices, respondent has engaged in the business of a dealer buying and selling livestock in commerce for his own account without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

Conclusions

By reason of the facts found in Finding of Fact 3 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 201.30).

ADDITIONAL CONCLUSIONS OF THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to file a timely answer or deny the allegations of the complaint constitutes a admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 C.F.R §§ 1 136(a)-(c), .139, .141(a)):

§ 1 136 Answer.

(a) Filing and service. Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .

(b) Contents. The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure

(c) Default. Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

. . . .

§ 1.139 Procedure upon failure to file an answer or admission of facts.

> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.
>
> Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.
>
> . . . .
>
> § 1.141 Procedure for Hearing.
>
> (a) Request for Hearing. Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

The complaint contained allegations identical to the findings of fact, *supra*, and advised respondent that an answer must be filed with the Hearing Clerk and that "[f]ailure to file an answer shall constitute an admission of all material allegations of this complaint" (Complaint at 2).

In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent expressly and accurately advised respondent of the effect of failure to file an answer or plead specifically to any allegation of the complaint. The letter states:

> In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk an original and four copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.
>
> Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

After respondent failed to answer the complaint within 20 days, the Hearing Clerk notified respondent by a letter dated December 11,

1986, that his answer had not been timely filed. Even when served with complainant's April 15, 1987, Motion for Adoption of Proposed Decision, respondent did not file any response. Accordingly, the default order was properly issued in this case. Although on rare occasions default decisions have been set aside for good cause shown of where complainant did not object, [3] respondent has shown no basis for setting

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[3] *In re Veg-Pro Distributors*, 42 Agric. Dec 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Gallop*, 40 Agric. Dec. 217 (order vacating default decision) (case remanded to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981).

aside the default decision here. [4]

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 496 cases. The Department's Judicial Officer disposed of 42 cases. In a recent month, 66 new cases were filed with the Hearing Clerk.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous du-

[4] *See In re Bejarano*, 46 Agric. Dec ___ (June 22, 1987) (default order proper where timely answer not filed; respondent properly served even though his sister, who signed for the complaint, forgot to give it to him until after the 20 day period had expired); *See In re Zedric*, 46 Agric. Dec ___ (June 10, 1987) (default order proper where timely answer not filed); *In re Schmidt & Son, Inc.*, 46 Agric Dec ___ (Apr. 6, 1987) (default order proper where timely answer not filed); *In re Carter*, 46 Agric. Dec. ___ (Mar. 3, 1987) (default order proper where timely answer not filed; respondent properly served where complaint sent to his last known address was signed for by someone); *In re McDaniel*, 45 Agric Dec ___ (Dec 8, 1986) (default order proper where timely answer not filed); *In re Mayes*, 45 Agric Dec. ___ (Nov. 24, 1986) (default order proper where answer not filed), *appeal docketed*, No. 87-3066 (6th Cir. Jan. 23, 1987); *In re Pieszko*, 45 Agric. Dec. ___ (Nov. 12, 1986) (default order proper where answer not filed), *In re Henson*, 45 Agric. Dec ___ (Nov. 4, 1986) (default order proper where answer admits or does not deny material allegations; *In re Guffy*, 45 Agric Dec. ___ (Oct 20, 1986) (default order proper where answer, filed late, does not deny material allegations), *In re Blaser*, 45 Agric. Dec. ___ (Sept. 9, 1986) (default order proper where answer does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric Dec. ___ (Sept 9, 1986) (default order proper where timely answer not filed); *In re Schwartz*, 45 Agric. Dec. ___ (Aug. 12, 1986) (default order proper where timely answer not filed); *In re Midas Navigation, Ltd*, 45 Agric Dec ___ (July 9, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Gutman*, 45 Agric Dec. ___ (June 17, 1986) (default order proper where answer does not deny material allegations), *In re Daul*, 45 Agric Dec. ___ (Mar 6, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc*, 44 Agric. Dec. ___ (Sept. 23, 1985) (default order proper where timely answer not filed, irrelevant that respondent's main office did not promptly forward complaint to its attorneys), *In re Cuttone*, 44 Agric Dec ___ (Aug. 20, 1985) (default order proper where timely answer not filed, respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A Cuttone), *aff'd per curiam*, 804 F 2d 153 (D C. Cir 1986) (unpublished), *In re Corbett Farms, Inc*, 43 Agric Dec. ___ (Nov 1, 1984) (default order proper where timely answer not filed; respondent cannot present evidence that it is unable to pay $54,000 civil penalty where it waived its right to a hearing by not filing a timely answer), *In re Jacobson*, 43 Agric Dec ___ (June 26, 1984) (default order proper where timely answer not filed), *In re Buzun*, 43 Agric Dec ___ (June 13, 1984) (default order proper where timely answer not filed, respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Mayer*, 43 Agric Dec 439 (1984) (decision as to respondent Doss) (default order proper where timely answer not filed, irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No 84-4316 (5th Cir. July 25, 1984), *In re Lambert*, 43 Agric. Dec. 46 (1984) (default order proper where timely answer not filed); *In re Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely answer not filed); *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where respondents misunderstood the nature of the order that would be issued); *In re Seal*, 39 Agric Dec 370, 371 (1980) (default order proper where timely answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

ties.' "[5] If respondent were permitted to contest some of the allegations of fact at this late date, or raise new issues, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to present matters by way of defense at this time.

Although respondent's alleged defense, that he does not buy and sell as a dealer, will not be considered in this case, it should be noted that complainant does not concede that respondent has any legitimate defense. Complainant "believes that it has sufficient evidence to prove the allegations of the complaint should the judge permit the respondent to proffer evidence in his defense at this time" (Complainant's Response at 1).

For the foregoing reasons, the following order should be issued.

Order

Respondent Charley Charton, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of $500. The civil penalty shall be paid by certified check made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Packers and Stockyards Division, Office of the General Counsel, Room 2446-South, United States Department of Agriculture, Washington, D.C. 20250-1400, not later than the 90th day after service of this order on respondent.

The cease and desist provision of this order shall become effective on the day after service of this order. The suspension provisions shall become effective on the 30th day after service of this order.

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[5] *Cella v. United States*, 208 F 2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC v Pottsville Broadcasting Co.*, 309 U S. 134, 143 (1940); *accord Swift & Co. v United States*, 308 F.2d 849, 851-52 (7th Cir. 1962).

In re: MIKE EATON.

P&S Docket No. 6836.

Order filed July 13, 1987.

Order issued by Dorothea A. Baker, Administrative Law Judge.

COMPLAINT DISMISSED

Upon Motion therefor, the Complaint filed in this proceeding is hereby dismissed.

Copies hereof shall be served upon the parties.

In re: VERNON HART, d/b/a URBANA AUCTION MARKET.

P&S Docket No. 6735.

Order filed July 9, 1987.

Edward M. Silverstein, for complainant.

Respondent, pro se.

Order issued by Edward H. McGrail, Administrative Law Judge.

SUPPLEMENTAL ORDER

On June 2, 1987, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent as a registrant under the Act for "one year and thereafter until (1) he demonstrates that the deficit in his " 'Custodial Account for Shippers' Proceeds" has been eliminated; and (2) until such time as he complies fully with the bonding requirements under the Act and the regulations." The order further provided, in pertinent part, that the order may be modified to permit respondent's salaried employment by another registrant after the expiration of a thirty day period of suspension.

Respondent has requested that he be permitted to become a salaried employee of another registrant, Springfield Regional Stock Yards Company, d/b/a Springfield Regional Commission Co. Complainant has no objection to such modification. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued June 2, 1987, is modified, effective July 13, 1987, to permit respondent's salaried employment by the above-named registrant. The order shall remain in full force and effect in all other respects.

In re. KINGSPORT LIVESTOCK AUCTION CORPORATION.

P&S Docket No. 6746.

Order filed July 30, 1987.

Robert Swartzendruber, for complainant

Daniel W Olsen, Kansas City, Missouri, for respondent

Order issued by Victor W. Palmer, Administrative Law Judge

SUPPLEMENTAL ORDER

On June 24, 1987, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent as a registrant under the Act for a period of two weeks and thereafter until it demonstrates that the deficit in its custodial account has been eliminated.

Respondent has now demonstrated that the deficit in its custodial account has been eliminated. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued June 24, 1987, is terminated. The order shall remain in full force and effect in all other respects.

In re: MACON LIVESTOCK MARKET, INC. AND GLYN COLEY.

P&S Docket No. 6781.

Order filed July 30, 1987.

Sharlene W. Lassiter, for complainant.

Jon A. Wells, Lafayette, Indiana, for respondent.

Order issued by Victor W. Palmer, Administrative Law Judge.

SUPPLEMENTAL ORDER

On July 9, 1987, an order was issued in the above-captioned matter which, *inter alia*, suspended respondents as registrants under the Act until such time as respondent Macon Livestock Market, Inc., demonstrates solvency and that the deficiency in its custodial account has been eliminated.

Respondent Macon Livestock Market, Inc., has now demonstrated solvency and that the deficiency in its custodial account has been eliminated. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued July 9, 1987, is terminated. The order shall remain in full force and effect in all other respects.

In re: TINA LIVESTOCK AUCTION, INC., et al.

P&S Docket No. 6811.

Order filed July 17, 1987.

Thomas C. Heinz, for complainant.

Ernest H Van Hooser, Kansas City, Missouri, for respondent.

Order issued by Dorothea A. Baker, Administrative Law Judge.

SUPPLEMENTAL ORDER

On July 13, 1987, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent Tina Livestock Auction, Inc., as a registrant under the Act for a period of 14 days beginning July 5, 1987, and thereafter until it demonstrates the shortage in its custodial account for shippers' proceeds as been eliminated.

Respondent Tina Livestock Auction, Inc., has made such demonstration. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued July 13, 1987, is terminated effective July 19, 1987. The order shall remain in full force and effect in all other respects

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In re THOMAS B WEINBERG AND FREDERICK A. WEINBERG

P&S Docket No 6884

Order filed July 15, 1987.

Roberta Swartzendruber, for complainant

Respondents, pro se

Order by Edward H McGrail, Administrative Law Judge

ORDER GRANTING MOTION TO DISMISS AS TO FREDERICK A. WEINBERG AND TO STRIKE NAME FROM CONSENT ORDER

For good cause shown in complainant's motions filed July 1, 1987, and July 10, 1987,

It is ordered, that the complaint issued in this matter on May 18, 1987, be, and hereby is, dismissed without prejudice as to Frederick A. Weinberg.

It is further ordered, that the permission requested by complaint counsel to strike the name of Frederick A. Weinberg from the caption and body of the consent order filed July 10, 1987, is granted.

PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISIONS

In re: W. L. BRADLEY COMPANY, INC.
Bankruptcy No. 86-01936G.
Opinion filed June 17, 1987.

Perishable Agricultural Commodities Act trust funds.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OPINION

By BRUCE FOX, Bankruptcy Judge:

The debtor, W. L. Bradley Co., Inc., filed a voluntary petition under chapter 11 of the Bankruptcy Code on April 18, 1986. Prior to its filing, the debtor was engaged in the business of wholesale distribution of fruits and vegetables. It terminated its business operations on or about March 24, 1986, shortly before its bankruptcy filing.

On December 22, 1986, Sunkist Growers, Inc. ("Sunkist") filed a motion "for relief from the automatic stay under section 362(a) and for turnover of property not part of debtor's estate; and for abandonment and possession of trust corpus under section 554(b) and for interest and attorney's fees." In its motion, Sunkist asserted that it holds a perfected interest as a trust beneficiary in the amount of $72,361.02 in a nonsegregated, floating trust pursuant to the Perishable Agricultural Commodities Act, as amended, 7 U.S.C. §499e(c) ("PACA"). Attached to the motion were various invoices evidencing Sunkist's sale of citrus fruit to the debtor in early 1986 and certain notices Sunkist sent to the U.S. Department of Agriculture ("USDA") and the debtor in an effort to perfect the alleged PACA trust. Since Sunkist has not been paid for the fruit, its motion requested that the court order the debtor to make immediate payment of the $72,361.02, plus prejudgment and postjudgment interest, and schedule a hearing for the purpose of awarding Sunkist attorney's fees and costs. The debtor filed an answer to the motion, denying most of Sunkist's factual averments and raising a number of affirmative defenses.

A hearing on Sunkist's motion was held and, at that time, Sunkist advised the court that it would not press any claim for trust status of four of the nine invoices at issue. [1] As a result, the parties agreed that

[1] With respect to those four invoices, the debtor had challenged Sunkist's claim on the ground, *inter alia*, that Sunkist had not perfected its trust status in a timely manner.

the sum in dispute amounts to $37,585.90. [2] After the conclusion of testimony, the parties also agreed that if the court upheld Sunkist's status as a PACA trust claimant, its request for interest, attorney's fees and costs would be considered at a later hearing.

Based on the findings of fact and conclusions of law set forth below, I hold that: (1) pursuant to PACA, the debtor is holding $37,585.90 in trust for Sunkist; (2) Sunkist is entitled to relief from the automatic stay; and (3) the debtor should be required to promptly pay the trust funds to Sunkist. [3]

Findings of Fact

1. The debtor filed a voluntary petition under chapter 11 of the Bankruptcy Code on April 18, 1986.

2. Prior to its bankruptcy filing, the debtor was engaged in the business of wholesale distribution of fruits and vegetables and ceased doing business on or about March 24, 1986.

3. The debtor received no income other than from the operation of its business of wholesale distribution of fruits and vegetables during the two years preceding the filing of its bankruptcy petition.

4. In the year and one half period prior to its bankruptcy filing, the debtor engaged in approximately 225 business transactions with Sunkist.

5. The debtor is obligated to Sunkist in the amount of $37,585.90, for citrus fruits purchased by the debtor under the terms and conditions of the following invoices:

Invoice Number	Date Shipped	Invoice Date	Amount
21-10192	3/6/86	3/15/86	$6,600.00
02-36216	3/17/86	3/26/86	$8,738.70
02-36217	3/17/86	3/27/86	$7,808.00
02-35963	3/13/86	3/28/86	$5,737.50
02-36484	3/19/86	3/28/86	$8,825.25 [4]

6. Each invoice reflects fruit ordered by the debtor from Sunkist and sold by Sunkist to the debtor. The debtor received all of the ordered fruit.

7. Payment under each invoice was due ten days after the invoice date.

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[2] At the hearing, the debtor made clear that it does not dispute that it received the shipments of fruit and that their price was $37,585.90. It disputes only whether Sunkist should be accorded PACA trust claimant status.

[3] As a result of this decision, it is unnecessary to rule on Sunkist's motion for abandonment under 11 U.S.C. § 554(b)

[4] The sum of these invoices is $37,709.45. The parties agree that the present indebtedness is only $37,585.90, apparently due to the application of a credit in favor of the debtor.

8. Sunkist sent the debtor and the USDA notice of intent to preserve trust benefits, pursuant to PACA, under the sales invoices as follows:

Invoice Number	Date of Notice to Debtor	Date of Notice filed with USDA
21-10192	3/14/86	3/17/86
02-36216	4/7/86	4/10/86
02-36217	4/7/86	4/10/86
02-35963	4/7/86	4/10/86
02-36484	4/7/86	4/10/86

9. To date, the debtor has not paid Sunkist for the citrus fruit supplied under the sales invoices described in paragraph 5 above.

10. The debtor is also obligated to Sunkist in the amount of $34,865.12 for citrus fruits purchased by the debtor under the terms and conditions of four invoices numbered 20-10261, 45-10809, 45-10860, 02-35963 ("the second group of invoices").

11. With respect to the second group of invoices, Sunkist filed notices of intent to preserve trust benefits with the USDA pursuant to PACA which represented that the notices were being filed within forty days of the invoice date and thirty days of the payment due date.

12. The actual invoices which comprise the second group contain information inconsistent with that set forth in the notices sent to the USDA by Sunkist. Specifically, a comparison of the notices with the actual invoices suggests that the notices were filed more than forty days after the invoice date and more than thirty days after the payment due date.

13. Based on the information contained in invoices comprising the second group, the debtor asserted before this court that the trust notices were not timely under PACA. Sunkist thereupon withdrew its request for trust status with respect to the second group of invoices.

14. Although it has conducted no business since filing its chapter 11 bankruptcy, the debtor still holds a license to engage in its prepetition activities from the USDA under PACA.

15. As of December 17, 1986, the debtor maintained $150,344.86 on deposit in an insured money market account with Fidelity Bank.

16. The funds in the money market account constitute a commingled fund of proceeds from sales of perishable agricultural products.

17. The debtor's prospects for reorganization are dependent upon collecting an account receivable owed by Joseph Russo, who himself is a bankruptcy debtor in the United States Bankruptcy Court for the Southern District of New York Litigation on the claim has been commenced in the New York court.

18. As of the date of trial, debtor's bankruptcy filing, the only expenditure from the debtor's money market account has been a single

$60.00 disbursement in connection with the Russo litigation in New York. [5]

19. The debtor is aware of another creditor, Gwin, White & Prince, which claims the status of a trust beneficiary under PACA.

20. On its schedules, the debtor has listed priority claims in excess of $10,000.00 and a secured claim in the amount of $250,000.00.

21. The debtor believes that if it is required to pay Sunkist and Gwin, White & Prince the amounts they are demanding as PACA trust claimants, all of the debtor's funds on hand will be consumed and the debtor will be unable to consumate a plan of reorganization.

Discussion and Conclusions of Law

Sunkist's claim in this matter is derived from the amendments to PACA enacted by Congress in 1984. Before discussing the legal issues arising in the case *sub judice,* it is helpful to first briefly outline the purpose of the PACA trust provisions and the manner in which they operate.

In amending PACA in 1984, Congress made a finding that financing arrangements, which allow purchasers of perishable agricultural commodities who have not yet paid for the commodities to give lenders a security interest in the purchased fruit and vegetables, constitute a "burden on commerce" and are "contrary to the public interest." 7 U.S C. § 499e(c)(1). The legislative history explains.

> Sellers of agricultural commodities are often located thousands of miles from their customers Sales transactions must be made quickly or they are not made at all. . . . Under such conditions, it is often difficult to make credit checks, conditional sales agreements, and take other traditional safeguards.
>
> . . .
>
> Many [buyers], in the ordinary course of their business transactions, operate on bank loans secured by [their] inventories, proceeds or assigned receivables from sales of perishable agricultural commodities, giving the lender a secured position in the case of insolvency. Under present law, sellers of fresh fruits and vegetables are unsecured creditors and receive little protection in any suit for recovery of damages where a buyer has failed to make payment as required by the contract.
>
> In recent years, produce sellers have been subjected to increased instances of buyers failure to pay and slow payments.

H R No. 98-543, 98th Cong., 1st Sess. 3 (1983) ("House Report").

To deal with this perceived problem, Congress amended PACA "to increase the legal protection for unpaid sellers and suppliers of perishable agricultural commodities until full payment of sums due have been received by them" in the form of a nonsegregated, floating trust that applies to the commodities, products derived therefrom and any receiv

[5] Since trial, a small administrative expense claim has been allowed.

able or proceeds from their sale in the hands of the buyer. Id. at 1. The statutory authority for the trust is codified at 7 U.S.C. § 499e(c)(2). [6] As one court has explained, an unpaid obligation "becomes a trust obligation of the [buyer], prior to and superior to any lien or security interest in inventory held by the dealer's secured lender." *In re Prange Foods, Corp.*, 63 B.R. 211, 214 (Bankr. W.D. Mich. 1986). The legislative history expressly notes that the PACA trust was modeled on the trust amendments to the Packers and Stockyards Act ("PSA") enacted in 1976, *see* 7 U.S.C. § 196. House Report at 4. As a result, courts have looked to decisions under the PSA trust amendments for guidance in construing the PACA trust provisions. *See In re Monterey House, Inc.*, 71 B.R. 244 (Bankr. S.D. Tex. 1986); *In re Fresh Approach, Inc.*, 51 B.R. 412 (Bankr. N.D. Tex. 1985) (Fresh Approach II).

The statutory trust operates in favor of "all unpaid suppliers or sellers of such commodities or agents involved in the transaction." 7 U.S.C. § 499e(c)(2). In order to perfect its status as trust beneficiary, a seller, supplier or agent must file a notice of its trust claim with the USDA within thirty days after payment has fallen due. 7 C.F.R. § 46.46(g). Once the seller has perfected its status, it has no obligation to trace the assets to which its trust applies. The trust is "floating" and applies to all of the buyer's produce related inventory and proceeds thereof, regardless whether the trust beneficiary or another seller was the source of the inventory and proceeds thereof. House Report at 5; *Fresh Approach II*, 51 B.R. at 422; *In re Fresh Approach, Inc.*, 48 B.R. 926, 931 (Bankr. N.D. Tex. 1985) (*Fresh Approach I*). *See also* 7 C.F.R. § 46.46(c).

With these principles in mind, I turn to the four main arguments raised by the debtor in opposition to Sunkist's request for relief. [7]

A. Sunkist's Eligibility As a PACA Trust Claimant

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[6] 7 U.S C. § 499e(c)(2) provides, in pertinent part:

> Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents...

[7] The debtor also argues that Sunkist's perfection of its PACA trust claims constitutes an avoidable preference, *see* 11 U.S.C. § 547, devoting two pages of its twenty eight page memorandum to the issue. Based on the analysis set forth in *Fresh Approach II*, 51 B.R. at 422-24, I reject the debtor's argument. *See also* 11 U.S.C. § 547(c).

The debtor's lead argument in opposition to Sunkist's motion is that Sunkist has not established that it is eligible to be a PACA trust claimant. The statute creates a trust "for the benefit of all unpaid suppliers or sellers of . . . commodities or agents involved in the transaction . . . ." 7 U.S.C. § 499e(c)(2). The evidence at trial established that the debtor and Sunkist entered into contracts for the purchase of citrus fruit. There was also some evidence that suggested the fruit was actually packed and shipped by entities other than Sunkist, although Sunkist's name was on the fruit itself and the cartons used for shipping. Based on this record, the debtor argues that Sunkist has not sufficiently established its role in the transaction, or its relationship to the other entities that were apparently involved, to warrant a finding that it is a supplier, seller or agent under PACA.

The terms "supplier," "seller" and "agent" are not defined in the statute, rendering their interpretation somewhat more difficult. It is also troubling that Sunkist did not better explicate its role in the transactions at issue Nevertheless, I conclude that Sunkist has properly invoked the trust provisions of PACA.

When, as here, a statute does not define a term, courts will presume that the legislative purpose is expressed by the ordinary meaning of the words used. *Russello v. United States*, 464 U.S. 16, 21 (1983); *Diamond v. Diehr*, 450 U.S. 175, 182 (1981). Under this cannon of statutory construction, there can be little doubt that Sunkist is a seller or a supplier under PACA. While Sunkist's exact role in the marketing chain may not be fully clear, record establishes that Sunkist entered into contracts to sell the fruit to the debtor and was the "seller" in the transaction Also, in the ordinary usage of the term, Sunkist "supplied" the fruit to the debtor.

The legislative history confirms that the use of the common meaning of the statutory terms will effectuate Congress' intent:

> In the marketing of perishable agricultural commodities, there are many varied business arrangements resulting in the movement of these commodities from the farm to shipping point and to destination markets and ultimately the consumer. They include but are not limited to consignments, joint ventures, and grower agency arrangements. In a joint venture, it is common for one of the joint ventures to gain ownership, possession or control of the goods for the purpose of marketing the goods In that situation, a trust relationship arises as between the joint venture partner which has marketing responsibility and all other joint venturers. Another trust relationshp [sic] is established in the person or entity which gains ownership, possession or control of the goods from the joint venturers.
>
> . . .
>
> As each supplier, seller, or agent transfers ownership, possession, or control of perishable agricultural commodities to a

> commission merchant, dealer, or broker, such supplier, seller, or agent will automatically become a participant in the trust.

House report at 5.

The import of the passage quoted above is that Sunkist may have legal obligations to other entities from which it may have obtained the fruit it sold to the debtor; those obligations may even be in the form of a trust. However, Sunkist's relationships with other entities do not detract from its seller/supplier relationship with the debtor or its status as a PACA trust beneficiary with respect to the debtor. In short, the debtor's implicit argument [8] that some entity other than Sunkist is the sole, proper PACA trust beneficiary is unwarranted. It is therefore unnecessary to ascertain the precise nature of Sunkist's relationship with other companies which may have been involved in the packing and shipping of the subject fruit to the debtor.

B. The Validity of the Trust Notice Filed for Invoice Number 21-10192

As set forth in Finding of Fact Nos. 5, 7, invoice number 21-10192 shows a shipping date of March 6, 1986, an invoice date of March 15, 1986 and therefore a payment due date of March 25, 1986. Sunkist sent its notice of intent to preserve trust benefits to the USDA on March 14, 1986 and the notice was received there on March 17, 1986, eight days before payment was due. Findings of Fact Nos. 7, 8.

PACA provides:

> The unpaid supplier, seller, or agent shall lose the benefits of such trust unless such person has given written notice of intent to preserve the benefits of the trust to the commission merchant, dealer, or broker and has filed such notice with the Secretary *within thirty calendar days* (i) *after* expiration of the time prescribed by which payment must be made as set forth in regulations issued by the Secretary (ii) *after* expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering into the transaction, or (iii) *after* the time the supplier, seller, or agent has received notice that the payment instrument promptly presented for payment has been dishonored.

7 U.S.C. § 499e(c)(3) (emphasis added); *accord*, 7 C.F.R. § 46.46(g).

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[8] The debtor explicitly argues that entities which are only "agents" or "sellers" were not intended by Congress as trust beneficiaries; *i.e.*, that the only intended beneficiaries are growers of perishable agricultural commodities. Both the plain language of the statute and the legislative history lead me to reject this theory. *See* 7 U.S.C. §499e(c)(2) (referring to unpaid suppliers *or* sellers *or* agents); House Report at 5 ("It is intended that the amount claimable against the trust *by a seller supplier, including a grower* will be the net amount due him after allowable deductions for expenses or advances of the buyer, grower's agent, commission merchant, *or* receiver.").

Placing great emphasis on the use of the word "after," the debtor argues that Sunkist did not preserve its status as a trust beneficiary because its notice was filed before the expiration of the time deadline for payment of the invoice. In response, Sunkist asserts that it has satisfied the literal requirement of the statute and regulations, *i.e.*, its notice was on file with USDA within thirty days after the payment had fallen due. In effect, the debtor requests that the court construe the statute to require strict, technical compliance with at least one reading of its terms; Sunkist, on the other hand, would have the court construe the statutory and regulatory provisions as imposing no "ripeness" requirement for filing a notice, but only a limitations period. There are no cases under PACA or PSA on this issue.

While the answer to the question posed by the parties is not clear cut, I conclude that Sunkist's interpretation of the statute and regulation is the better of the two. Initially, I fail to see what policy goal is served by invalidating a trust notice filed before the buyer's payment is in default If the filing of the notice actually created the trust, a requirement that the seller await some time period could have some practical, industry-wide significance. However, as the court explained in *Fresh Approach II*, "the beneficial interest arises, by operation of law, upon delivery to a dealer of qualifying produce, and said interest exists unless and until either the claim is satisfied or the beneficiary fails to take the necessary steps to perfect." 51 B R at 423 Thus, the trust seems to arise upon delivery rather than upon the failure to make timely payment. Conversely, I am unaware of any practical difficulties (other than increased paperwork for the contracting parties and the USDA) if a "premature" filing were found valid Finally, I am guided by the general legislative intent to establish increased protection and an effective remedy for sellers, suppliers and agents. I will therefore, resolve any ambiguity in favor of Sunkist. *Cf Pennsylvania Agricultural Cooperative Marketing Association v Ezra Martin Co* , 495 F Supp. 565 (M.D. Pa. 1980) (PSA is to be construed liberally to prevent economic harm to its intended beneficiaries). In sum, the statutory use of the word, "after," marks the beginning of the thirty day period and does not prohibit an early filing.

C. The Debtor's Allegation of Unclean Hands and Request for Equitable Subordination

As explained earlier, Sunkist withdrew at trial its claim of trust status for four invoices in response to the debtor's assertion in this court that Sunkist's notices to the USDA of its intent to preserve trust benefits for those four invoices were not timely under 7 U.S.C. § 499e(c)(3) and 7 C.F.R. § 46.46(g). Based on this sequence of events, the debtor suggests that Sunkist notices to the USDA misrepresented the facts and argues that the court should deny Sunkist all the relief it requests.

The debtor invokes the equitable doctrine that a party seeking relief must come into court in good faith and with clean hands. *E.g., Ciba-Geigy Corp. v. Bolar Pharmaceutical Co.*, 747 F.2d 844 (3d Cir. 1984), *cert. denied*, 471 U.S. 1137 (1985); *American Bell, Inc. v. Federation of Telephone Workers*, 736 F.2d 879 (3d Cir. 1984); *In re Midwest Processing Co.*, 41 B.R. 90 (D.N.D. 1984). In the alternative, the debtor invokes the doctrine of equitable subordination, *see* 11 U.S.C. § 510(c)(1), which may be applied when: (1) the claimant has engaged in inequitable conduct; (2) the misconduct has resulted in injury to other creditors or has conferred an unfair advantage on the claimant; (3) equitable subordination would not otherwise be inconsistent with the provisions of the Bankruptcy Code. *E.g., In re Multiponics, Inc.*, 622 F.2d 709 (5th Cir. 1980); *In re Mobile Steel Co.*, 563 F.2d 692 (5th Cir. 1977); *In re Americana Apparel, Inc.*, 55 B.R. 160 (Bankr. E.D. Pa. 1985). 3 *Collier on Bankruptcy* ¶ 510.05[1], [2] (15th ed. 1987) ("Collier").

The debtor's argument fails due to insufficient evidence. The debtor established only that the information on the challenged invoices differed from the information sent to the USDA. There are many possible explanations for the discrepancies, including error and oversight. From the bare discrepancies only, the debtor requests that the court infer that Sunkist's conduct was intentional and fraudulent. I cannot do so. *Compare Silver v. Nelson*, 610 F.Supp. 505 (W.D. La. 1985) (fraud is never presumed and may not be inferred from circumstances which at most create only suspicion); *In re Brown*, 419 F.Supp. 199 (E.D. Va. 1975) (fraud is never presumed but must be proved by clear and convincing evidence); *In re Fritts*, 26 B.R. 43 (Bankr. E.D. Tenn. 1982) (same as *Brown*) *with Quintel Corp., N.V. v. Citibank, N.A.*, 606 F. Sup. 898 (S.D.N.Y. 1985) (intent to defraud may be inferred from circumstantial evidence where there is sufficient supporting evidence).

In evaluating Sunkist's good faith, I note also that Sunkist attached copies of all of the invoices upon which the challenged trust claims were based to its motion in this court. It thus appears that Sunkist made no effort to conceal the particulars of the four withdrawn trust claims from either the debtor or the court. Moreover, the debtor has not shown any injury has resulted to any party in interest from the alleged misrepresentations. In these circumstances, I decline to invoke either the doctrine of unclean hands or equitable subordination to deny Sunkist the relief it has requested.

D. The Relationship of PACA to the Bankruptcy Code

Next, the debtor argues that the fundamental principle of equality of distribution embodied in the Bankruptcy Code must override the trust provisions of PACA. The debtor asserts that nothing in PACA dictates

that PACA claims be accorded preferred status in a bankruptcy proceeding and submits that those courts which have uniformly construed PACA "to the detriment and exclusion of the bankruptcy legislation" are misquided. Debtor's Memorandum of Law at 25. [5]

This argument is easily rejected. The legislative history of the Bankruptcy Code itself expresses Congress' intent to honor statutory trust provisions such as that found in PACA.

> [11 U.S.C. § 541] and proposed 11 U.S.C. § 545 also will not affect various statutory provisions that give a creditor of the debtor a lien that is valid outside as well as inside bankruptcy, or that creates a trust fund for the benefit of a creditor of the debtor. *See* Packers and Stockyards Act § 206, 7 P.S. § 196.

H R. Rep. No. 95-595, 95th Cong., 1st Sess. 368 (1977).

There is no reason to believe that Congress' intent to respect the PSA trust provision is not equally applicable to PACA. Moreover, while there is no express reference in PACA's legislative history to the earlier Bankruptcy Code, it is obvious that a buyer's bankruptcy filing would be among the circumstances which would result in late payment or no payment at all to sellers, suppliers or agents. *Accord, In re Prange Foods, Corp.*, 63 B R. at 218 n.4; 49 Fed. Reg. 45735, 45738 (Nov. 20, 1984) (explanatory note to PACA trust regulations states that if buyer files a bankruptcy, trust assets are not to be considered part of the bankruptcy estate).

In short, the Bankruptcy Code principle of equality of distribution was created by Congress and it is within Congress' province to create exceptions to the principle Congress has done so, for certain statutory trusts arising under federal law. I see no reason to conclude that the statutory rights of a PACA seller, supplier or agent should be nullified simply because the buyer files a bankruptcy petition.

E Relief

The preceding discussion dictates the conclusion that $37,585.90 of the funds in the debtor's money market account are being held in trust for Sunkist. As the corpus of a trust in favor of a non-debtor beneficiary, those funds are not property of the debtor's estate. 11 U.S.C. § 541(d). *In re Monterey House, Inc.; Fresh Approach II.* Neverthe

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[5] The debtor also suggests that a PACA trust "is nothing more or less then [sic] an undisclosed and secret priority" as to other creditors and bona fide purchasers. Debtor's Memorandum of Law at 24. This argument is hard to fathom since notice of the trust is given to both the buyer (the debtor herein) and to the USDA Moreover, the legislative history expressly notes

> [The] statutory trust requirements will not be a burden to the lending institutions. They will be known to and considered by prospective lenders in extending credit . . . . Prompt payment should generate trade confidence and new business which yields increased cash and receivables, the prime security factors to the money lender.

House Report at 4.

less, Sunkist concedes that it must obtain relief from the automatic stay in order to take action to obtain payment from the debtor of the trust proceeds. *See* 11 U.S.C. § 362(a)(3) (stays act to obtain property *of* the estate *or* property *from* the estate); 2 Collier ¶ 362.04[3], at 362–34. (automatic stay protects property "in the possession of the estate"). In this case, Sunkist not only seeks relief from stay, but also an order directing the debtor to deliver the funds. [9] In response, the debtor argues that the trust funds are adequately protected and it should be allowed to continue to use the funds, particularly since it may not be able to reorganize without the use of the money.

I conclude that Sunkist is entitled to relief from stay and immediate payment from the debtor. My decision is based on the legislative purpose in the enactment of the PACA trust provision, which was to "assur[e] . . . that raw products will be paid for promptly." House Report at 4. As the court cogently explained in *Fresh Approach II:*

> It must be remembered that PACA was not enacted to protect those in Debtor's shoes, but rather to prevent the chaos and disruption in the flow of perishable agricultural commodities sure to result from an industry-wide proliferation of unpaid obligations. While in isolation, this may seem a harsh course to follow, in the macroeconomic sense PACA serves to ensure continuity of payment and therefore survival of the industry. Congress has plainly decided it would be less disastrous to risk the liquidation of a single purchaser than to threaten the entire production chain with insolvency. It is not the function of this Court to pass upon the wisdom of that decision.

51 B.R. at 420.

Given the clear expression of legislative intent, I cannot grant the debtors request for permission to continue to use the trust funds and to pay the trust obligation in full through a plan of reorganization. *Fresh Approach II; see In re Monterey House; cf. In re Dieckhaus Stationers of King of Prussia, Inc.*, No. 86-05671F, slip op. (Bankr. E.D. Pa. May 29, 1987) (immediate payment of administrative expense claim ordered because 11 U.S.C. § 365(d)(4) expresses legislative intent that trustee be required to pay nonresidential real property lease obligations

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[9] Sunkist's motion could have been limited to a request for relief from stay for the purpose of instituting an action against the debtor in federal district court. *See* 7 U.S.C. § 499(c)(4) (providing for federal jurisdiction of actions by trust beneficiaries to enforce payment from the trust). By requesting payment, Sunkist sought relief which, arguably, should have been instituted by adversary proceeding. *See* Bankr. Rule 7001(1). Since the debtor has not objected to the procedure, trial has been completed and the matter has been under advisement for a few months, I deem it equitable to consider Sunkist's demand for payment on its merits. *See In re Stern*, 70 B.R. 472, 473 n.1. (Bankr. E.D. Pa. 1987).

"on time" pending assumption or rejection of the lease).[10]
An order in accordance with this opinion will be entered.[11]

In re: W. L. BRADLEY COMPANY, INC.
Bankruptcy No. 86-01936G.
Order entered June 17, 1987.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ORDER

Entered by BRUCE FOX, United States Bankruptcy Judge:

AND NOW, this 17th day of June, 1987, upon consideration of the motion of Sunkist Growers, Inc. ("Sunkist") for relief from the automatic stay under section 362(a) and for turnover of property not part of debtor's estate and for abandonment and possession of trust corpus under section 554(b) and for interest and attorney's fees, the debtor's response thereto and after notice and hearing, it is ORDERED that.

1. The motion for relief from stay is granted.
2. The debtor shall promptly pay Sunkist the sum of $37,585.90.
3. A hearing will be held on August 3, 1987, to consider Sunkist's request for payment of interest and attorney's fees at 10 A M.

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[10] Therefore, I need not determine whether the debtor has provided Sunkist with adequate protection in this case. Nor do I decide if a bankruptcy trustee is obliged to deliver trust property to the beneficiary upon demand for trusts other than those created by PACA *Compare Georgia Pacific Corp v Sigma Service Corp.*, 712 F.2d 962, 968 (5th Cir 1983) (stating, in dictum, that bankruptcy court has power "to recognize the [trust beneficiary's] equitable interest . . *or to issue protective order prohibiting or conditioning its use*, if a cash equivalent, but then holding that funds impressed with a constructive trust must be paid to the beneficiary) (emphasis added), *cited in*, *Matter of Quality Holstein Leasing*, 752 F.2d 1009, 1012 (5th Cir 1985) *with In re N.S Garrott & Sons*, 772 F 2d 462, 467 (8th Cir. 1985) (where, under state law, debtor holds property subject to a constructive trust with a duty to reconvey the property to the rightful owner, the estate will generally hold the property subject to the same restriction).

[11] The motion for relief from stay is a core proceeding 28 U.S.C. § 157(b)(2)(G). To the extent Sunkist also seeks to compel immediate payment of the trust proceeds, this case is functionally equivalent to a proceeding to determine whether the debtor may use cash collateral, *see* 11 U S.C. § 363(c)(2); *In re Sacerdote*, No. 86-02953G, slip op. (Bankr E D Pa June 8, 1987), which is also a core matter. *See* 28 U.S.C § 157(b)(2)(M).

TRI-COUNTY WHOLESALE PRODUCE CO., INC., Petitioner v. U.S. DEPARTMENT OF AGRICULTURE and UNITED STATES OF AMERICA, Respondents.

No. 86-1139. [PACA Docket No. 2-6300.]

Decided July 7, 1987.

Continuing to employee a restricted individual, who failed to pay reparation awards, without filing the appropriate bond and obtaining the approval of the Department—Order of the Judicial Officer affirmed.

Stephen P. McCarron, for petitioner.

Aaron B. Kahn, Attorney, Department of Agriculture, with whom *James Michael Kelly*, Associate General Counsel, *Raymond W. Fullerton*, Assistant General Counsel; Department of Agriculture, were on the brief, for respondents.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petition for Review of an Order of the
U.S. Department of Agriculture.

Before: WALD, *Chief Judge*, EDWARDS and D. H. GINSBURG, *Circuit Judges*.

Opinion Per Curiam.

PER CURIAM: In a disciplinary proceeding brought by the Department of Agriculture, the Secretary of Agriculture determined that petitioner, Tri-County Wholesale Produce Co., Inc., violated section 8(b) of the Perishable Agricultural Commodities Act 7 U.S.C. § 499, et seq. ("PACA"), by continuing to employ a "restricted individual" without posting the required bond and obtaining the approval of the Department of Agriculture. The Secretary revoked petitioner's license to deal in perishable agricultural commodities. We affirm that decision.

I.

Congress enacted PACA in 1930 in an effort to assure business integrity in an industry thought to be unusually prone to fraud and to unfair practices. A later Congress summarized the purpose of the Act succinctly:

> [PACA] was enacted in 1930 for the purpose of providing a measure of control and regulation over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous. The law was designed primarily for the protection of the producers of perishable agricultural product—most of whom must entrust their products to a buyer or commission merchant who may be thousands of miles away, and depend for their payment upon his business acumen and fair dealing—and for the protection of consumers who frequently have no more than the oral representation of the dealer that the product they buy is of the grade and quality they are paying for. (S. Rep. 2507, 84th Cong., 2nd Sess. 3 (1956).

As this court has stated previously, "the goal of [PACA is] that only financially responsible persons should be engaged in businesses subject to the Act." *Finer Foods Sales Co., Inc. v. Block*, 708 F.2d 774, 782 (D.C. Cir. 1983), *citing Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835, 88 S.Ct. 43, 19 L. Ed. 2d 96 (1967), *quoted in Marvin Tragash Co. v. United States Dept. of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975). To this end, PACA requires dealers in perishable agricultural commodities to obtain licenses from the Secretary of Agricultural.

Dealers are required to pay accounts promptly, correctly, and in full. 7 U.S.C. § 499b. The Department of Agriculture can suspend or revoke the license of a dealer who fails to comply with these requirements. 7 U.S.C. § 499h(a). PACA also provides an administrative procedure to resolve payment disputes between dealers and producers. 7 U.S.C. § 499f. This procedure may result in a reparation award against a dealer that is found to be in default on a disputed obligation. 7 U.S.C. § 499g.

The license of a dealer who does not pay a reparation award is automatically suspended. 7 U.S.C. § 499g(d). Furthermore, an individual responsible for a dealer that does not pay a reparation award may not lawfully be employed by any other dealer licensed under PACA, unless the employing dealer obtains the approval of the Secretary of Agriculture and maintains a surety bond as assurance that it's business will be conducted in accordance with PACA. 7 U.S.C. § 499h(b).

II.

A license to do business under PACA was issued to Robert A. Ferwerda, doing business as Four Seasons Wholesale Produce, on November 23, 1979. The license terminated in November 1981 when Four Seasons failed to pay the annual license fee. Between December 1981 and August 1982, USDA issued six reparation awards against Robert and Four Seasons. He failed to pay these awards, and therefore became ineligible to be employed by any PACA licensee without special approval for two years from the date of the last reparation award.

In August 1981, Robert was hired by Tri-County Wholesale Produce Co., Inc., which was licensed under PACA and owned by Arend Ferwerda, Robert's father. In February 1982, after several of the reparation awards had been issued against Robert, the Secretary of Agriculture informed Tri-County that it could not employ Robert unless it posted a bond, in an amount to be set by the Department of Agriculture. The Secretary also notified Tri-County that it could jeopardize its license if it continued to employ Robert without posting the bond and obtaining the approval of the Department after 30 days from the receipt of the notification letter. Various correspondence passed between Tri-County and the Department between February and June 1982 regarding the setting of a bond and the status of Robert Ferwerda.

In a letter to the Department dated June 4, 1982, Arend Ferwerda represented that Tri-County had not employed Robert since March 25, 1982. In September 1982, the Department set the amount of the bond at $125,000 and emphasized once again that Tri-County could endanger its license by employing Robert without posting the bond and obtaining the approval of the Secretary. Tri-County did not post the $125,000 bond.

In June 1983, the Department filed an administrative complaint against Tri-County, charging that the firm had employed Robert Ferwerda from January 1982 to the present, despite the Department's February 1982 warning, and despite Tri-County's failure to post the $125,000 bond. Tri-County answered the administrative complaint later the same month and again asserted that it had not employed Robert, within the meaning of PACA, since March 25, 1982. Tri-County claimed that Robert's status since March 25, 1982, had been that of an independent contractor to, not an employee of, the company.

In January 1984, Tri-County amended its answer to the June 1983 administrative complaint to assert for the first time, as defenses, that the amount of the surety bond was excessive, and that it was set in an arbitrary and capricious manner.

At a hearing before an Administrative Law Judge (ALJ), numerous witnesses testified with respect to Robert Ferwerda's relationship to Tri-County after March 25, 1982. These witnesses testified that Robert had, on specific occasions known to them, purchased produce, solicited business, and accepted deliveries on behalf of Tri-County. He answered Tri-County's telephone and frequented its premises. Other evidence revealed that Robert was still covered by the firm's health insurance policy. The ALJ, however concluded that Tri-County had intended to terminate Robert's employment on March 25, 1982, and that any subsequent contacts were minimal. Nonetheless, the ALJ issued a cease and desist order that prohibited Tri-County from hiring Robert to haul produce, answer telephones, or work in the office.

Both parties appealed the decision to the Judicial Officer of the Department of Agriculture. Upon reviewing the evidence presented at the administrative hearing, the Judicial Officer found that Tri-County had not in fact terminated Robert Ferwerda's employment on March 25, 1982. The Judicial Officer found instead that Tri-County's "termination" of Robert, and his status as an "independent contractor," were cosmetic, and that he had continued to function as an employee of Tri-County. Finally, the Judicial Officer noted that Tri-County's defenses regarding the amount and setting of the bond should have been raised in the appropriate forum when the bond was first set in September 1982, not more than 15 months later in the instant proceeding.

The Judicial Officer revoked Tri-County's license for continuing to employ Robert Ferwerda in violation of PACA.

III.

Tri-County maintains that it can properly challenge the manner and amount of the bond set by the Department of Agriculture in the context of this disciplinary proceeding to revoke or suspend its license. Tri-County argues that it had a "right to refrain from challenging the bond at the time it was set and to trust that any proceeding the Agency might initiate would provide a forum in which it could assert its rights to a fair bond." Brief for Petitioner at 22.

The weakness of this argument is apparent. For a period of several months prior to the Department's determination of the amount of the bond it would require as a condition for approving Tri-County's employment of Robert Ferwerda, the firm continued to employ him despite the fact that PACA clearly prohibited such employment in the absence of a bond. The period in question is from February 19, 1982, when the Department notified Tri-County that it was not to employ Robert without obtaining permission and posting a bond, until September 24, 1982, when the Department set the bond at $125,000. Tri-County would thus be equally in violation of the Act if the subsequent bond had been set at the lower amount and by the different procedures to which the company claims it was entitled. Any defect in the amount of, or procedures later used to set, the bond does not enable Tri-County to avoid liability for the several months of its non-compliance before the bond was set.

PACA is clear in this regard: "Except at the approval of the Secretary, no licensee shall employ any person . . . against whom there is an unpaid reparation award issued within two years." 7 U.S.C. § 499h(b). Tri-County's violation began, therefore, when it continued Robert Ferwerda in its employ after notification by the Secretary that he was a restricted person, without having gotten permission to rehire him. We need not determine, therefore, whether Tri-County might have challenged the amount of or the procedures for setting the bond when the Secretary determined that the amount of the bond should be $125,000. That was not until September 1982, long after the violation had begun. It is immaterial whether Tri-County would have been required to initiate a challenge to the bond or could have rehired Robert at that time and awaited enforcement by the Secretary. It did neither: in simple defiance of the statute, it retained Robert in its employ before the amount of the bond or the procedure for setting it could possibly have been the source of Tri-County's grievance.

IV.

Tri-County argues that the procedures and standards for setting bonds are substantive rules of general applicability, and are thus required to be published in the Federal Register. 5 U.S.C. §

552(a)(1)(D). Tri-County, however, can claim no prejudice based on non-publication in the Federal Register of rules relating to the bonding requirement, for the same reason that it cannot here upset its license revocation based on a claim that those rules are substantively defective. Again, it violated the Act by employing Robert Ferwerda before the bond was an issue.

This point is slightly different than the one made by the Judicial Officer below, *viz.*, that even if publication were required, Tri-County received actual notice of the significant factors to be considered in setting the bond in the Department's February 16, 1982 letter and received actual notice of the Department's internal instructions for making bond amount determinations at the hearing below. The latter point is weak and comes too late, while the former point is accurate but immaterial. Even if Tri-County did not have actual notice of the factors that the Department of Agriculture would consider in setting a bond amount, it was not at liberty to continue employing Robert Ferwerda. As of the time it began to violate PACA, it was at most entitled to know the factors on which the Department would base its decision (which the Department in fact told it in the February 16 letter), so that it could make a calculated estimate of the probability of success on the merits if it decided to keep Robert in its employ and pin its hopes on a later challenge to the factors used in setting the bond amount. (As it turns out, Tri-County is not challenging the factors that the Department use to set the bond.)

Tri-County also argues that the Department of Agriculture failed to give it sufficient prior warning and notice of what was expected of it, so that any ensuing violation could not be willful. Tri-County seems really to mean here that the Department did not say precisely what in meant by "employment" and this left it the option, in good faith, of relating to Robert as an "independent contractor." The Act on its face indicates that the statutory term "employment" is to be given a broad reading, indeed to include "any affiliation." 7 U.S.C. § 499a(10). We need not decide whether an independent contractor relationship constitutes such an "affiliation," however. As we have seen, there was more than enough evidence to sustain the finding of the Judicial Officer that Tri-Count continued actually to "employ" Robert Ferwerda.

The order of the Judicial Officer is, *Affirmed*.

ADAMS BROTHERS PRODUCE CO. v. POSEY PRODUCE COMPANY, INC.

PACA Docket No. 2-7537.

Order issued July 10, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

(Summarized)

Complainant notified the Department that settlement had been reached, and authorized dismissal of its complaint filed herein

Accordingly, the complaint was dismissed.

BELLEVUE GARDENS ORGANIC FARM, INC. v. NEOPC, INC.

PACA Docket No. 2-7221.

Decision and order issued July 28, 1987.

Breach of contract by shipper—Acceptance—Burden of proof—Damages.

Where shipper breaches contract but buyer accepts anyway, buyer liable for contract price less provable damages resulting from breach by shipper.

Edward M. Silverstein, Presiding Officer.

Complainant, pro se.

Frank Infelise, Lynn, Massachusetts, for respondent.

Decision and order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which the complainant seeks $2,856.50, as reparation, in connection with one transaction involving watermelons, a perishable agricultural commodity, in interstate commerce.

Each party was served with a copy of the Department's report of investigation. In addition, the respondent was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant.

Since the amount in dispute did not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) was followed. Under that procedure, the verified

pleadings of the parties are considered part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements, but neither party did so. Respondent filed a brief.

Findings of Fact

1. Complainant, Bellevue Gardens Organic Farm, Inc., is a corporation whose mailing address is Route 2, Box 625, Archer, Florida 32618.

2. Respondent, NEOPC, Inc., is a corporation whose address is 24 Jytek Park, Leominster, Massachusetts 01453. At all material times, respondent was licensed under the act.

3. On or about June 11, 1985, respondent agreed to purchase from complainant, approximately, one-half a trucklot of watermelons at a delivered price of 12.5¢ per pound. The parties agreed that the truck would proceed directly to the respondent's location after making a stop in Baltimore, Maryland, and would be refrigerated. The parties further agreed that the watermelons would be delivered to respondent's location not later than June 13, 1985, and that respondent had two weeks from that date in which to seek a credit for damaged watermelons.

4. The complainant loaded, approximately, 42,080 pounds of watermelons on a truck operated by Jody and Jerry Rains on June 11, 1985. The truck, which was not refrigerated, made deliveries of watermelons to Madison, Wisconsin, Ann Arbor, Michigan, and Rochester, New York, before finally reaching respondent's location in Leominster, Massachusetts, on June 17, 1985. On that date, respondent received and accepted 1075 watermelons each of which averaged 16 pounds in weight, or 17,200 pounds.

5. Although respondent began receiving complaints from its customers regarding the watermelons, and notified the complainant regarding these claims within the two week period referred to in paragraph 3 above, it did not have the watermelons inspected.

6. The formal complaint was received on November 27, 1985, which was within nine months after the cause of action herein accrued.

Conclusions

This case involves a partial trucklot of watermelons which was supposed to have been delivered to the respondent, by refrigerated truck, not later than June 13, 1985. As it was delivered in a truck without a refrigeration unit on June 17, 1985, the respondent had an absolute right to reject the load. *See Mendelson-Zeller v. Certified*, 32 Agric. Dec. 1527 (1973). However, it did not. Since it received and accepted the watermelons, it is liable for the full contract price less any provable damages caused by a breach of contract committed by the complainant. *Rocky Ford Dist. Co. v. Angel Produce*, 29 Agric. Dec. 93 (1970). Respondent has the burden of proof on these issues. *The*

Growers–Shipper Pot. Co. v. Southw. Pro. Co., 28 Agric. Dec. 571 (1969). Because it failed to offer any evidence, such as an inspection certificate, supporting its claim that the complainant breached its warranty as to the condition of the watermelons, we must find that respondent has failed to show that the watermelons were not as warranted. Accordingly, we hold that it is liable to the complainant for all of the watermelons which it received and accepted.

Complainant alleges that respondent received and accepted 28,300 pounds of watermelons, or 1,415 watermelons at 20 pounds each. The evidence it offered in support of this allegation does not hold water, *i.e.*, nowhere does complainant prove the actual count or actual weight of watermelons delivered to respondent but rather it attempts to reach these figures by inductive reasoning. Respondent, on the other hand, attests that it received only 1,075 watermelons, a fact which is supported by the truck driver's receipt, and that its employee weighed 30 of the watermelons and discovered their average weight to be 16 pounds.

On the basis of the evidence, we hold that respondent received and accepted 1,075 watermelons, averaging 16 pounds each, or 17,200 pounds of watermelons. It is thus obligated to complainant for $2,150.00 (17,200 x 12.5¢). As it has paid complainant $681.00, it is still obligated to complainant in the amount of $1,469.00. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

Order

Within 30 days from the date of this order, respondent shall pay complainant $1,469.00, as reparation, plus interest at the rate of 13% per annum, until paid.

Copies of this order shall be served upon the parties.

BLUE BAR BLUEBERRIES v. SAWYER FRUIT & VEGETABLE COOPERATIVE CORP.

PACA Docket No. 2–7102.

Order issued July 8, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), a Decision and Order was issued on May 12, 1987, dismissing the complaint. On May 28, 1987, the complainant filed a "Petition to Reconsider the Facts."

Complainant's petition raises no contentions or issues which were not raised and fully considered in our order of May 12, 1987. [1] In our opinion, the May 12, 1987, Decision and Order is supported by the evidence and the law applicable thereto. Accordingly, complainant's "Petition to Reconsider the facts" is denied without prior service on respondent.

The Order of May 12, 1987, is reinstated.

Copies of this order shall be served upon the parties.

L. CACHO & SONS FARM v. CAL-MEX DISTRIBUTORS, INC.

PACA Docket No. 2-7516.

Order Issued July 10, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

(Summarized)

In its answer to the complaint, respondent alleged that the amount sought by complainant had been deducted by complainant on a subsequent invoice and, therefore, was no longer outstanding. Complainant was given an opportunity to dispute the fact that the outstanding amount had been paid, but did not do so.

Accordingly, the complaint was dismissed.

CAL/MEX DISTRIBUTORS, INC. v. TOM LANGE COMPANY, INC.

PACA Docket No. 2-6979.

Decision and order issued July 27, 1987.

Consignment, distinguished from sale on open basis—Rejection, acceptance of, required in most circumstances—Evidence, sworn statement of attorney had no probative value—Acceptance, by diversion of shipment—Inspection, covered only 43% of load and failed to substantiate that condition warranted rejection—Broker, evidence showed respondent acted as broker and did not receive load on consignment.

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[1] Complainant also seeks to adduce new evidence. The Rules of Practice, 7 C.F.R. § 47.24, do not permit the reopening of a record after the issuance of a decision. Accordingly, such evidence was not considered in determining whether or not to grant complainant's petition.

Complainant sought reparation in regard to three shipments of produce. It was found that the Feb. 1, 1985, shipment of tomatoes was sold on an open basis rather than consigned, that respondent accepted the tomatoes by diverting them from the original destination, that respondent then illegally rejected the tomatoes, and that complainant accepted the illegal rejection on condition that a subsequent inspection would show the condition warranted rejection. The inspection covered only 43% of the load and failed to substantiate that the condition of the tomatoes warranted rejection. Respondent was held liable for the tomatoes' reasonable value as shown by Market News Service reports. A second load of tomatoes was found to have been consigned to a third party through respondent acting as broker and respondent was held to have incurred no liability to complainant in regard to such load. As to a third load of mixed produce, the parties were found to have entered into a final settlement agreement.

George S. Whitten, Presiding Officer.

Complainant, pro se.

LeRoy W. Gudgeon, Northfield, Illinois, for respondent.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $11,245.30 in connection with the shipment in interstate commerce of a truckload of mixed produce and for unspecified amounts in connection with the shipment in interstate commerce of two truckloads of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complaint, and asserting a set-off or counterclaim against complainant in the total amount of $5,416.40 in connection with the same transactions which were the subject of the formal complaint. Complainant filed a reply to the counterclaim denying any liability thereunder.

The amount claimed in the formal complaint or counterclaim does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Complainant also filed a brief.

Findings of Fact

1. Complainant, Cal/Mex Distributors, Inc., is a corporation whose address is P. O. Box 1717, Chula Vista, California. At the time of the transactions involved herein, complainant was licensed under the Act.

2. Respondent, Tom Lange Company, Inc., is a corporation whose address is 510 Plaza Drive, Suite 2220, Atlanta, Georgia. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about February 1, 1985, complainant sold to respondent on an "Open" basis one truckload of tomatoes consisting of 1188 flats size 5x5, 396 flats size 5x6, and 108 lugs size 6x6, with the destination stated in the bill of lading to be Atlanta, Georgia.

4. On February 1, 1985, the tomatoes were shipped from complainant's place of business in Chula Vista, California. Respondent caused the tomatoes to be sent to its customer, Royston Tomato House, in Bristol, Tennessee. Upon arrival at the place of business of Royston Tomato House on February 5, 1985, that firm rejected due to alleged condition defects. The branch manager of respondent's Atlanta branch, Eric R. Hoffmann, contacted complainant's sales manager, George M. Ellis, Jr., and informed him of what had occurred and that an inspection would not be available in Bristol until February 7, 1985. Mr. Ellis stated that he did not want the tomatoes waiting in Bristol for two days for an inspection and therefore agreed to "accept the rejection" subject to the load being moved to Atlanta, Georgia, and its condition being confirmed by federal inspection there. The parties contemplated that the load would be inspected in the Atlanta area on February 5, 1985.

5. The load of tomatoes moved to Atlanta and was available for inspection at the place of business of Georgia Tomato Company at least by the morning of February 6, 1985. Respondent placed an order for federal inspection at 8:28 on that morning. Georgia Tomato Company at 1:15 p.m., on February 6, noting that the inspector had not arrived, called the inspection office and was advised that they were running late. Georgia Tomato Company then, in view of the fact that it closed at 1:00 p.m., requested that inspection be rescheduled for early on the morning of the 7th.

6. At 8:30 a.m. on February 7, 1985, an inspection of a portion of the tomatoes was made which revealed in relevant part as follows:

> PARTLY UNLOADED
>
> TEMPERATURES 42 degrees F. TOP 41 degrees F. BOTTOM
>
> . . .
>
> PRODUCT: Fresh tomatoes in cartons printed "MBC, Produce of Mexico, distributed by Dual Distributors, Inc., Nogales, Ariz." cartons marked "EX LG 55A Count 50" or "LG EXLG 56 A Count 60" to denote size.
>
> . . .
>
> QUALITY AND CONDITION: Average approximately 60% turning and pink, 30% light red and red. Soft tomatoes range

from 5 to 22% in half of cartons, none in remainder, average 6%. Decay ranges from 2 to 12%, average 5%, Bacterial Soft Rot and Gray Mold Rot, mostly in advanced stages, some early stages. Damage by sunken discolored areas over the shoulders averages 4%.

. . .

REMARKS: Inspection restricted to product in upper 8 layers of above mentioned lot only. Trailer contains another lot of tomatoes, not inspected, at applicant's request.

. . .

7. Georgia Tomato Company refused to handle the tomatoes and respondent had the tomatoes sent to Dixieland Produce Company in Birmingham, Alabama. DixieLand Produce Company secured a federal inspection covering 569 containers of the tomatoes on February 27, 1985, showing condition as "Practically all show Alternaria Rot in various stages, mostly advanced." DixieLand then called respondent and informed respondent that the 569 containers had been dumped and that they would pay only 75¢ per container for the 108 6x6's and 75¢ per container for the 1015 containers of 5x6's, or a total of $842.25. Dixieland refused to prepare and issue an account of sales.

8. On or about February 1, 1985, complainant consigned to Georgia Tomato Company, through respondent acting as broker, one truckload of tomatoes to be handled by Georgia Tomato Company for complainant's account.

9. On or about March 1, 1985, complainant sold to respondent one truckload of mixed perishable produce in the quantities and at the prices stated below, and on the same date, complainant shipped such produce to respondent at the places of business of respondent's customers as set forth below:

Bill of Lading No. 5157 - Super Value Stores, Anniston, Alabama

252 W/B Crates cucumbers, super select	@ 6.65	$1,675.80
42 W/B crates K.Y. beans	@ 15.00	630.00
82 W/B crates green bell peppers, lg.	@ 20.65	1,693.30
		$3,999.10

Bill of Lading No. 5158 - Collins Bros., Atlanta, Georgia

84 W/B crates green bell peppers, med.	@ 18.65	$1,566.60
108 W/B crates cucumbers, super select	@ 6.65	718.20
120 W/B crates K.Y. beans	@ 15.00	1,800.00
		$4,084.80

Bill of Lading No. 5159 - Cerniglia Produce Co., Atlanta, Georgia

84 W/B crates green bell peppers, med.	@ 18.65	$1,566.60
72 crates cucumbers, super select, sm.	@ 4.65	334.80
		$1,901.40

Bill of Lading No. 5160 – Adams Produce Co., Atlanta, Georgia		
84 W/B crates K.Y. beans	@ 15.00	$1,260.00

10. Upon arrival of the truck at the place of business of Super Value Stores in Anniston, Alabama, respondent was contacted by its customer and informed that the K.Y. beans had arrived showing decay and were being rejected and put back on the truck. Respondent's customer also stated that the cucumbers would be accepted if protection was granted. Respondent's Eric Hoffmann then contacted complainant's George Ellis by telephone and informed him of what had occurred and also stated that to wait for a U.S.D.A. inspection in Anniston would delay the movement of the truck by at least one day. Mr. Ellis agreed at that time to grant protection on the cucumbers and also agreed to the rejection of the K.Y. beans asking Hoffmann to find a handler for them in Atlanta.

11. The truck arrived at the place of business of Collins Brothers in Atlanta, Georgia, on March 5, 1985, and a federal inspection was made of a portion of the produce at 8:30 a.m. on that date with the following results in relevant part:

> TEMPERATURES: 44 degrees F. TOP 45 degrees F. BOTTOM
>
> . . .
>
> PRODUCT. Green snap beans in wirebound crates labeled "Karina Brand Grown in Mexico" cucumbers in wirebound crates labeled "Rene brand grown in Mexico"
>
> . .
>
> QUALITY AND CONDITION: Beans: Decay ranges from 3 to 15%, average 9% gray mold rot mostly scattered throughout pack some occurring in nest. Cucumbers: Decay ranges from 18 to 34% average 25%, cottony leak mostly in early stages, many advanced.
>
> . . .
>
> REMARKS: Inspection restricted to product in upper 4 layers of load. Applicant's lot #19506.

Respondent was informed by telephone from Collins Brothers that the 108 crates of cucumbers and 120 crates of K.Y. beans were being rejected. Respondent then informed George Ellis of this fact at 10:49 a.m. on March 5, and also gave him the details of the federal inspection. Mr. Ellis informed Mr. Hoffmann that he would accept the rejection and asked Mr. Hoffmann to find a handler for the rejected products.

12. The truck arrived at the place of business of Cerniglia Produce Company in Atlanta on the morning of March 5, 1985, and that company telephoned respondent at time of arrival stating that the bell pep-

pers would be accepted but that it would only accept the cucumbers if a substantial allowance was granted. At 11:16 a.m. on the same date, respondent telephoned George Ellis and informed him of the message it had received from its customer. Mr. Ellis stated that there was no point in getting a further U.S.D.A. inspection and agreed to grant an allowance of $1.50 per crate on the cucumbers. Respondent then informed Cerniglia Produce of the offer of $1.50 per crate and such offer was accepted.

13. The truck arrived at the place of business of Adams Produce Company on the morning of March 5, 1985, and respondent was telephoned by such company and informed that the 84 crates of K.Y. beans were being rejected because of condition. At 11:50 a.m. on the same date, respondent telephoned George Ellis and advised him of the rejection. Mr. Ellis accepted the rejection without requesting a further U.S.D.A. inspection. Mr. Hoffmann, on behalf of respondent, then agreed with Mr. Ellis that the remaining 108 crates of cucumbers and 246 crates of K.Y. beans which had been rejected should be given to Kontos Fruit Company in Birmingham, Alabama, with full protection.

14. In April, Mr. Hoffmann and Mr. Ellis again conversed by telephone and agreed the respondent would pay complainant for the truckload of mixed vegetables on the basis of what respondent had billed its customers less a brokerage of 15¢ per package and freight and inspection charges and a charge back from Super Value of $343.20. This agreement did not apply to the produce which was sent to Kontos Fruit Company and the parties agreed that complainant should receive whatever was remitted by Kontos Fruit Company less brokerage.

15. The formal complaint was filed on June 12, 1985, which was within nine months after the causes of action alleged herein accrued.

Conclusions

Complainant brings this action to recover reparation from respondent in connection with the shipment of two truckloads of tomatoes and one truckload of mixed produce. We will deal with each shipment separately.

The first shipment, on February 1, 1985, of a truckload consisting of 1692 containers of tomatoes is described in the formal complaint as having been "sold to respondent" on a consignment basis "to be sold for complainant's account." The formal complaint also described the tomato transaction as "OPEN". Complainant issued a bill of lading in connection with the load which showed the tomatoes as consigned to Tom Lange in Atlanta, Georgia, and showed no price under the printed heading "Price" for any of the sizes of tomatoes.

Respondent alleges in its answer that the tomatoes were not received on consignment, but were purchased on terms of "Price to be determined after sale." This was reiterated in respondent's answering statement which was in the form of an affidavit by respondent's Atlanta

branch manager, Eric R. Hoffmann, who handled negotiations on respondent's behalf. Mr. Hoffmann additionally stated that the load was sold by respondent on the same terms, "Price to be determined after sale", to Royston Tomato House in Bristol, Tennessee, and that upon arrival at the place of business of Royston Tomato House on February 5, 1985, that firm rejected the load due to condition defects. Mr. Hoffmann alleges (and at this point, complainant agrees) that he then contacted complainant's George Ellis who stated he did not want the load to wait the required two days to receive federal inspection in Bristol, and therefore agreed to "accept the rejection" subject to the load being moved to Forest Park, Georgia, and the poor condition being confirmed by a U.S.D.A. inspection there. The parties agree that respondent was to try to get Georgia Tomato Company to handle the load in Georgia. Mr. Hoffmann alleged in the answering statement that following the partial federal inspection on February 7, 1985, he was unable to get Georgia Tomato Company to handle the load and also "when trying to place the load on consignment" was unable to get other firms in the Atlanta area to take the load. Mr. Hoffmann stated in the answering statement that he was able to locate a firm in Birmingham to take the load, Dixieland Produce Co., and called Mr. Ellis to inform him of this, and was directed by Mr. Ellis to send the load to Dixieland Produce Co., "to be sold to best advantage." Mr. Hoffmann further alleged that after the load had been disposed of by Dixieland Produce Company he was called by that firm "and told that some 589 flats had been dumped and they would pay only 75¢ per lug for the 108 6x6's and 75¢ for the 1015 flats of 5x6's for a total of $842.25." Mr. Hoffmann asserted that he "made numerous attempts to get Dixieland Produce Co. to prepare an Account of Sale and submit evidence as to the dumping." From all these statements in the answering statement, it appears to us to be clear that Mr. Hoffmann is maintaining that the tomatoes were given to Dixieland Produce Co. on a consignment basis However, in Mr. Hoffmann's letter to this Department of May 7, 1985, he states as follows:

> After numerous attempts to place the load in Atlanta, Dixieland Produce agreed to unload the tomatoes and handle them on a price-after-sale basis. I called George at Cal/Mex and told him who would take them and sell them for the best advantage . . .

From all of the above, it appears to us that both complainant and respondent's Mr. Hoffmann are confused as to the correct terminology to distinguish a consignment and a sale. "Open" is a term made applicable by the Uniform Commercial Code where there is "a contract for sale even though the price is not settled." U.C.C. § 2-305. Yet, complainant described the tomato transaction as "Open" as well as "Sold to

respondent on a consignment basis." Mr. Hoffmann appears to believe that the tomatoes were given to Dixieland "to handle on a price-after-sale basis", which is clearly terminology describing a sale, but also further describes the transaction with Dixieland in terms which must be viewed as indicative of a consignment. It is in the light of this apparent mutual misunderstanding of the terminology being used that we must assess complainant's continuing insistence that the tomatoes were "consigned" to respondent and respondent's continuing insistence that the tomatoes were purchased by it on terms of "price to be determined after sale." Obviously, the terminology used by the parties can be of little help in determining their intent, and we must rather look at how the parties actually dealt with the tomatoes.

The bill of lading shows the destination of the tomatoes as Tom Lange, Atlanta, Georgia. Respondent asserts in its answer that "Respondent had directed Complainant ship the load to Bristol, Tennessee." The answer, although verified, and thus in evidence under the shortened procedure (7 C.F.R. § 47.20(a)) was signed by respondent's attorney and consequently has no probative value. See *Royal Valley Fruit Growers Association v. Hamady Bros. Food Markets, Inc* , 37 Agric. Dec. 1925 (1978). Respondent's answering statement does not address itself clearly to the question, and although respondent issued a "Purchase and Sale Order" covering the agreement which stated that by special agreement the load was "to deliver to Royston Tomato House, Bristol, TN", such document was not issued until February 4, after shipment on the 1st. We conclude from all the evidence that the load was diverted by respondent to Bristol, TN., from the original Atlanta destination disclosed by the bill of lading. This, then, would seem to indicate that the transaction was a sale rather than a consignment because the regulations provide that a "commission merchant engaged to sell consigned produce may not employ another person or firm, including auction companies, to dispose of all or part of such produce without the specific prior authority of the consignor." The parties agree that following arrival in Bristol, Royston Tomato House rejected the tomatoes and upon communication of such rejection by respondent to complainant on February 5, 1985, complainant "accepted the rejection" conditioned upon respondent's securing a federal inspection in Atlanta confirming the alleged poor condition of the tomatoes. This also is indicative of a sale rather than a consignment. A party who has agreed to act as another's agent in receiving and selling consigned merchandise cannot reject a shipment absent a clear breach of the *agency* contract. Absent an express agreement to the contrary, such a breach would not be indicated by the mere arrival of the produce in poor condition. Even if consigned produce arrives in unsalable condition, the commission merchant would normally be expected not to reject, but to confirm the condition by federal inspection, dump such produce, and

render an accounting to the shipper showing the amount of the deficit for which the shipper would be liable. The admitted fact of the rejection in the present case thus also indicates that the parties here conceived of the transaction as a sale rather than a consignment. Taking into consideration all of the above factors, we conclude that the tomatoes were sold to respondent on a F.O.B. basis with price open.

The question now arises as to what effect, if any, is to be given to the rejection and the "acceptance of the rejection." In the context of the vast majority of rejection situations, the use of terminology referring to an "acceptance of a rejection" is both superfluous and meaningless. We have held many times that a seller has a positive legal duty to accept any rejection that is effective, even if the rejection is substantively wrongful. *Yokoyama Bros. v. Cal-Veg Sales*, 41 Agric. Dec. 535 (1982); *Produce Brokers & Distributors v. Monsour's* , 36 Agric. Dec. 2022 (1977); *Bruce Church, Inc. v. Tested Best Foods Div.*, 28 Agric. Dec. 377 (1969). The only situation in which a seller can refuse to "accept a rejection" in the sense of refusing to take possession of "rejected goods" is where the rejection is ineffective. *Dew-Gro, Inc. a/t/a Central West Produce v. First National Supermarkets, Inc.*, 42 Agric. Dec. ___ (1983). This is, of course, the necessary result in the case of an ineffective rejection because an ineffective rejection has the same legal consequences as an acceptance, and legal title is not reinvested in the seller. As White and Summers state, in such a case, "even if the goods were nonconforming, the parties will be treated as though no rejection has occurred." White and Summers, *Uniform Commercial Code*, Sec. 8-3, p. 265 (1972). Accordingly, when a buyer has made an effective rejection and later alleges that the seller accepted the rejection, he is alleging that the seller did no more than what the law required him to do. By the same token, a seller who is confronted with an effective rejection by his buyer and responds with the words "I accept the rejection", has only said he will do what the law and normal commercial practice require. A seller who, in conformity with the requirements of the law, again takes possession of goods which have been rejected, certainly does not by such action forfeit his right to make a claim for damages under U.C.C. § 2-703. How, then, could the additional fact that he verbally affirms that he is going to take possession of the rejected goods alter in any way his right to make such a claim? The obvious answer is that such verbal affirmation does not alter his right or modify the contract unless he makes it abundantly clear that it was his intent, by such words, to do just that.

In the present case we have the exception that proves the rule. The rejection here could not be effective because it was illegal. Any rejection following an act of acceptance is a rejection "without reasonable cause" under the regulations. 7 C.F.R. § 46.2(bb). Respondent ac-

cepted the tomatoes by diverting them from the original Atlanta, Georgia, destination to Royston Tomato House in Bristol, Tennessee. *Lindermann Farms v. Food Fair Stores*, 36 Agric. Dec. 92 (1977). Consequently, since complainant was in this case not legally required to "accept the rejection", complainant's undertaking to do so must be taken as more than the mere acknowledgment of a duty. However, both parties agree that the undertaking was conditional. The condition was that respondent would have the load transported to Atlanta, and secure a federal inspection in Atlanta on February 5, that would substantiate the rejection. We take this to mean that an inspection would be taken in Atlanta on the 5th which would show condition factors bad enough to warrant rejection in a f.o.b. sale. It is also clear that respondent was to retain custody of the produce and secure the Atlanta inspection. The inspection was not made in Atlanta until the 7th, but a more serious problem for respondent concerns the extent and result of the inspection. The inspection covered only 726 of the original 1692 containers of tomatoes, or approximately 43% of the load. Considering the limited extent of the inspection, the condition factors noted by the inspection do not show that the tomatoes were in a condition which would warrant rejection. Thus, the required condition for complainant's acceptance of respondent's rejection did not take place, and respondent must be viewed as having accepted the tomatoes.

Respondent tried to find a firm in Atlanta to take the load on a consignment basis but was unable to do so, and therefore sent the load to Dixieland Produce in Birmingham, Alabama. Although respondent alleges that this was accomplished with complainant's consent, complainant maintains that it did not know where the load ended up until approximately on month later. Even if we were to find that complainant consented to the load going to Birmingham to be sold on consignment, this, would not indicate that complainant intended a modification of the contract thereby. However, we find that the load was moved to Birmingham on respondent's responsibility.

As we stated earlier, respondent accepted the tomatoes. Respondent is therefore liable to complainant under the original contract. Such contract did not specify a price for the tomatoes, but was, open as to price. Accordingly, respondent is liable to complainant for the reasonable value of conforming tomatoes in Atlanta, Georgia, on February 5, 1985. Applicable Market News Service reports for Forest Park, Georgia, on February 5, 1985, show prices for 20 pound cartons of pink to light red tomatoes from Florida and Mexico repacked locally. The report shows size 5x5 and 5x6's sold for $10.50 to $12.00 and 6x6's sold for $9.50 to $10.50. We will accordingly assign a value of $12.00 for the 5x5's, $10.50 for the 5x6's and $10.50 for the 6x6's, or $19,548.00 for the truckload. From this amount should be deducted freight in the amount of $3,000.00, leaving a net of $16,548.00. Re

spondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

In regard to the second load of tomatoes shipped on February 1, 1985, complaint's Robert Villalobos states in the formal complaint that "We were not informed by respondent until March 12, 1985, that they had consigned the produce to Georgia Tomato Company . . . " However, the bill of lading issued by complainant and attached as an exhibit to the formal complaint shows the load consigned to Georgia Tomato Company, Atlanta, Georgia. In addition, complainant's George Ellis states in regard to this load as follows:

> . . . When I talked to Eric at Tom Lange Co., Atlanta, he said that he wanted to consign a load to Georgia Tomato Co. I agreed, but only on the grounds that we would bill Tom Lange Co.-Atlanta, and that Eric would handle everything on his end and submit the returns to Cal/Mex Distributors, because we had never done any business with Georgia Tomato Co., and I did not want to risk an entire load with a company that I knew nothing about . . .

Complainant's Villalobos attempts to explain what occurred in complainant's reply to the answer as follows:

> The second truckload, bill of lading 4833, was on consignment, but not as respondent claims between complainant and respondent's reconsignee, Georgia Tomato Co. . . . Said produce would only be shipped if consigned to respondent and not Georgia Tomato Co. Respondent did order said truckload from us with respondent's own order No. 2267, on consignment to it. As complainant knew that said load was to be delivered to Georgia Tomato Co., it so indicated on its bill of lading.

Respondent maintains that it only acted as a broker in regard to this load and secured the agreement of Georgia Tomato Company to take the load of tomatoes on consignment. We have carefully examined the record in regard to this transaction and have concluded that respondent's version of the transaction is correct. Respondent has no liability to complainant in regard to this load.

The third load of mixed produce was sold by complainant to respondent on March 1, 1985. The findings of fact in regard to this load reflect our findings in favor of respondent's version of the transaction. The record makes it clear that respondent's Eric Hoffmann was involved on respondent's behalf in all negotiations relative to this transaction. In addition, the record is also clear that complainant's George Ellis represented complainant in regard to all negotiations relative to the second load. In spite of this fact, almost all of complainant's evidentiary submissions in regard to this transaction consisted of affidavits made by Robert Villalobos. The only exception is a very short paragraph in an affidavit by George Ellis attached as an exhibit to complain-

ant's reply to respondent's counterclaim. Such paragraph states as follows:

> In regards to the load of mixed vegetables sold to Tom Lange Co.–Atlanta, and shipped 3/1/85, protection was only granted because we were led to believe that federal inspections were taken on the entire load. Eric personally told me that the load had been inspected, and federal U.S.D.A. inspection certificates would be sent to us. When I learned that no such inspections existed, I told Eric that Cal/Mex would be expecting full invoice price for the load.

Eric Hoffmann, in a lengthy affidavit submitted as respondent's answering statement, detailed his version of what transpired relative to the third load after its arrival at the places of business of respondent's customers. No response was made by Mr. Ellis to any of these allegations. More importantly, Mr. Hoffmann asserted in the same statement that a final settlement was entered into between him and Mr. Ellis relative to this load in April. The record contains no response from Mr. Ellis relative to this allegation. Accordingly, we have found that respondent's allegations in regard to this transaction are correct. Such allegations support a balance due to complainant as to this load after deductions for the Super Value chargeback, labor, freight, and inspection of $7,249.60. Respondent has already paid complainant $2,226.40 of this amount which leaves a balance still due of $5,023.20.

Respondent also asserts in its answering statement that it is due certain amounts on prior transactions. Complainant admitted $118.60, but a further charge of $518.20 was explicitly denied by Villalobos and by George Ellis, and we conclude that respondent has not sufficiently proven complainant's liability for such amount. Respondent has also claimed freight charges relative to the load consigned through it as broker to Georgia Tomato Co., and has explained that such charges were incurred due to the tomatoes being transported on a Tom Lange Co. truck. We deem that respondent has sufficiently proven its entitlement to such charges in the amount of $2,059.20. Accordingly, the amount of $2,177.80 should be set off against the total amount of $21,571.20 which we have previously found due and owing from respondent to complainant. This leaves a net amount of $19,393.40 due and owing from respondent to complainant. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Order

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $19,393.40, with interest thereon at the rate of 13% per annum from March 1, 1985, until paid.

Copies of this order shall be served upon the parties.

CAL-SHRED, INC., d/b/a STRAWBERRY CITY SALES v. GEORGE R. PAYTON, d/b/a PAYTON PRODUCE.

PACA Docket No. 2-7067.

Decision and order issued July 13, 1987.

F.O.B. sale—Modification of contract.

Complainant sold and shipped a load of strawberries to respondent on a f.o.b. basis. The berries were accepted by respondent and a Federal inspection two days later showed extensive condition problems. The results of the inspection were conveyed through the broker to complainant, but temperatures disclosed by the inspection were not given to complainant. Complainant granted protection. It was held that since complainant was conscious when it granted protection that temperatures were important but chose to remain in ignorance of such temperatures, the protection agreement could not be set aside. However, complainant was awarded reparation for ten flats of berries for which respondent failed to account.

George S. Whitten, Presiding Officer.

Decision and order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $2,368.40 in connection with the shipment in interstate commerce of a partial truckload of strawberries.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement and respondent filed an answering statement. Complainant filed a brief.

Findings of Fact

1. Complainant, Cal-Shred, Inc., is a corporation doing business as Strawberry City Sales, whose address is P.O. Box 801, Salinas, California.

2. Respondent, George R. Payton, is an individual doing business as Payton Produce, whose address is 492 Finley Avenue West, Birming-

ham Alabama. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On or about May 8, 1985, complainant sold to respondent and shipped from loading point in California to respondent in Birmingham, Alabama, 576 flats of strawberries at $4.00 per flat, plus 65¢ per flat for pre-cooling, $114.00 for Tectrol, and 15¢ per flat for brokerage, or a total of $2,878.80 f.o.b.

4. The strawberries arrived at respondent's place of business in Birmingham, Alabama, on Saturday, May 11, 1985, and were unloaded by respondent from the truck into respondent's cooler. Trouble was noted in the strawberries at this time and a federal inspection was called for. The strawberries were federally inspected on May 13, 1985, at 1:45 p.m., while stacked inside respondent's cooler. Such inspection showed temperatures at various locations of 55 degrees Fahrenheit. Condition was shown to be "Mostly ripe and firm and fairly bright. Soft and leaking mostly 5 to 15%, many none, average 5%. Decay mostly 4 to 25%, many none, average 10% Gray Mold Rot in various stages." The condition of the strawberries was relayed to complainant through the broker, C. H. Robinson Company of Forest Park, Georgia, on May 13, 1985. However, the temperature shown by the inspection was not relayed to complainant at that time. Based on the condition of the strawberries, it was mutually agreed between the parties that complainant would grant protection to respondent.

5. On May 15, 1985, at 9:00 a.m., 368 flats of the strawberries were again federally inspected while stacked inside respondent's cooler. Such inspection revealed the temperature of the strawberries to be 60 degrees Fahrenheit and stated the condition to be as follows: "Practically all berries show decay, Gray Mold Rot in all stages." Under the heading "Remarks," the inspection report showed "Applicant states lot to be dumped." Respondent resold 198 flats of the strawberries prior to May 16, 1985, for gross proceeds of $1,144.00. Sales slips showing sales of the 198 flats of strawberries to various customers were attached to respondent's answer. Respondent deducted freight in the amount of $1.10 per flat for the total 576 flats and remitted net proceeds of $510.40 to complainant.

6. The formal complaint was filed on October 28, 1985, which was within nine months after the cause of action alleged herein accrued.

Conclusions

Complainant's sales manager, William J. Stafford, asserted in the opening statement that when he was notified on May 13, 1985, by C. H. Robinson Company of the condition of the strawberries as shown by the federal inspection of May 13, 1985, he requested the pulp temperatures. Mr. Stafford states the broker was "unaware of what the pulp temperatures were and was accordingly unable to relay these temperatures to my office." Mr. Stafford further stated that "While I was

awaiting further communication on the temperatures, it was mutually agreed that based on the condition, my office would grant protection . . ." Randall L. Bonner, of C. H. Robinson Company, confirmed in a letter which was attached as an exhibit to the Department's report of investigation that no temperature was given when the inspection was reported to complainant on May 13. Mr. Bonner also asserted that complainant never requested temperatures at that time. However this may be, there is no basis on this record for setting aside the protection agreement entered into between the parties to this proceeding. Complainant was obviously conscious at the time it entered into the protection agreement that temperatures were important and nevertheless chose to remain in ignorance of what the temperatures were. See *Nalbandian Farms, Inc. v. McDonnell & Blankfard, Inc.*, (PACA Docket No. 2-7014, decided April 24, 1987), 46 Agric. Dec. ___ (1987).

The documentation submitted by respondent to show its losses under the protection agreement substantiates the dumping of 368 of the flats of strawberries and the resale of 198 flats for total gross proceeds of $1,144.00. There is no documentation covering the resale of the remaining 10 flats. The average price realized by respondent for the sale of the 198 flats was $5.78 per flat. We will assign this average price as the value of the ten flats as to which no documentation was submitted. Respondent's deduction of freight in the amount of $1.10 per flat is, of course, permissible. Respondent has paid complainant the difference between the cost of freight and the gross proceeds of the resale of the 198 flats, or $510.40. There remains due from respondent to complainant $57.80 for the ten flats as to which respondent submitted no documentation covering the resale. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $57.80, with interest thereon at the rate of 13% per annum, from June 1, 1985, until paid.

Copies of this order shall be served upon the parties.

THE CASTELLINI COMPANY v. CARTIAN PRODUCE, INC.
PACA Docket No. 2-7045.
Order issued July 29, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

(Summarized)

In its letter dated July 7, 1987, complainant authorized dismissal of its complaint filed herein.

Accordingly, the complaint was dismissed.

JOS. CIMINO FOODS, INC. v. CONTINENTAL PRODUCE, INC

PACA Docket No. 2-7204.

Decision and order issued July 13, 1987.

Burden of proof, respondent's.

Where respondent fails to prove consignment superseded original sales agreement, respondent is held liable for full agreed contract price.

Edward M. Silverstein, Presiding Officer.

Complainant, pro se.

Respondent, pro se.

Decision and order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks $17,288.00 as reparation from respondent in connection with one transaction, in interstate commerce, involving garlic, a perishable agricultural commodity.

Respondent was served with a copy of the formal complaint. Although it failed to file a timely response, its default was set aside by order issued June 20, 1986, and it filed an answer thereafter in a timely fashion. Each party was served with a copy of the Department's report of investigation.

Although the amount in dispute exceeded $15,000.00, the parties waived oral hearing. Therefore, this matter was heard pursuant to the shortened procedure set forth in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20). Under that procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's report of investigation. It should be noted that, as it was not verified, respondent's answer is not considered in evidence. The complaint which was verified is part of the evidence in this matter Also, the parties were given further opportunity to submit evidence by way of verified statements. Complainant submitted an opening statement. Neither party submitted a brief.

Findings of Fact

1. Complainant, Jos. Cimino Foods, Inc. is a corporation whose address is 557-A W. Alma Street, San Jose, California 95125.

2. Respondent, Continental Produce, Inc., is a corporation whose address is 1200 N.W. 22nd Street, Miami, Florida 33142. At all material times, respondent was licensed under the Act.

3. On or about February 14, 1985, in the course of interstate commerce, by oral contract, complainant sold to respondent one trucklot of garlic consisting of 1,400 30 pound cartons of U.S. No. 1 late gralic at a delivered price of $20.00 per carton, for a total agreed price of $28,000.00. However, the parties agreed that the respondent was "to receive full protection on entire load versus market decline." The broker involved in the transaction, Gene Morris Company, Incorporated, Columbia, South Carolina, issued a brokers memorandum indicating the above terms. The trucklot of garlic was shipped on February 16, 1985, and arrived at respondent's location on February 19, 1985. Upon arrival, the parties renegotiated their contract to conform with the sizes of garlic which actually were shipped and received and, on February 19, 1985, the broker issued another brokers memorandum indicating that the parties had agreed to the following terms: 617 30 pound cartons of U.S. No. 1 giant late garlic at $20.00 per carton delivered ($12,340.00); 137 30 pound cartons of X-Flor late garlic at $18.00 per carton delivered ($2,466.00); and 146 30 pound cartons of Tube late garlic at $17 00 per carton delivered ($2,482.00), for a total delivered price of $17,288.00. [1] This brokers memorandum also provided that the respondent was "to receive full protection on entire load versus market decline." At some time thereafter, although it was not sent to complainant, the broker added the following language to the second brokers memorandum of sale: "Continental Produce to handle xflor and tube size for account of shipper, due to wrong size being shipped."

4. On February 20, 1985, the trucklot of garlic was the subject of a federal inspection which reflected their grade as U.S. No. 1.

5. On May 1, 1985, 350 cartons of garlic, which may have been part of the subject shipment, was federally inspected. It reflected that the garlic suffered from an average of 48% Blue Mold Rot. This garlic was dumped.

6. A formal complaint was filed on November 14, 1985, which was within nine months after the cause of action herein accrued.

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[1] The record is not clear as to why complainant did not ship the remaining 500 cartons called for in the first brokers memorandum of sale or whether these 500 cartons were ever shipped.

Conclusions

The instant matter involves one trucklot of garlic valued at $17,288.00. Complainant has satisfied its burden of proving that respondent received and accepted the subject garlic and that respondent is obligated to it in the amount of $17,288.00 for the shipment. The burden then shifted to respondent to prove all the facts necessary for it to establish its defense, *i.e.*, that the parties' original sales agreement was superseded by an agreement that the X-Flor and Tube garlic were to be handled on consignment. *R.D. McGinnis Produce v. Pinder's Prod. Co.*, 28 Agric. Dec. 249 (1969). In its unverified answer, respondent alleges that the complainant did not ship garlic which conformed to the parties' agreement in that not all of the garlic shipped was giant size, and that the parties then agreed that the allegedly off-sized garlic was to be handled on consignment. [2] However, the respondent's answer was not verified and, therefore, is not part of the evidence of the case. The evidence which is in the record does not support such a claim. The first brokers memorandum of sale, dated February 14, 1985, does not contain any size requirement; the second brokers memorandum of sale, dated February 19, 1985, after the garlic arrived at respondent's location, does not indicate any disagreement between the parties with regard to the sizes of the garlic which the respondent received. Only the third brokers memorandum, which is also dated February 19, 1985, and which complainant denies receiving until after it filed its complaint, indicates that respondent may have some problem with the size of the garlic. On the basis of this evidence, we cannot say that respondent has carried its burden of proving that the parties agreed that it could handle the X-Flor and Tube garlic on consignment. Moreover, respondent, although given ample opportunity to do so, has submitted no evidence, such as an account of sale, proving that it actually did handle the garlic on consignment. [3] We must conclude, therefore, that respondent has failed to satisfy its burden of proof.

In view of the above, we hold that respondent is liable to the complainant in the amount of $17,288.00 with respect to the subject shipment, and that its failure to pay complainant this amount is a violation of the Act for which reparation plus interest should be awarded.

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[2] Respondent makes no claim whatsoever that it was damaged by complainant's apparent failure to ship the full 1,400 cartons called for in the first brokers memorandum of sale. Nor has respondent made any claim that it was damaged by market price decline.

[3] It should be noted that respondent was given the opportunity to submit evidence in a verified answer to the complaint after its default was set aside and again was given an opportunity to submit evidence by way of a verified answering statement in response to complainant's verified opening statement, but failed to do so in each case.

Order

Within thirty days from the date of this order, respondent shall pay complainant $17,288.00, as reparation, plus interest at the rate of 13% per annum from April 1, 1985, until paid.

Copies of this order shall be served upon the parties.

FRANK S. ECKEL, III AND WILLIAM R. SHERER d/b/a SKIP'S CONSOLIDATION v. INTERCOAST MARKETING, INC.

PACA Docket No. 2-7560.

Order issued July 24, 1987.

Dennis Becker, Presiding Officer.

Complaint, pro se.

Respondent, pro se.

Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

(Summarized)

In its answer to the complaint, respondent admitted the material allegations of the complaint, including indebtedness to complainant in the amount of $6,130.25. Complainant was given an opportunity to dispute the fact that the amount outstanding was $6,130.25, and did not do so.

Accordingly, respondent was ordered to pay complainant, as reparation, $6,130.25 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

EXETER SALES INC. v. JOHN LIVACICH PRODUCE, INC. a/t/a MATRIX MARKETING.

PACA Docket No. 2-7451.

Order issued July 29, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

(Summarized)

Complainant notified the Department, by letter dated July 7, 1987, that settlement had been reached, and authorized dismissal of its complaint filed herein.

Accordingly, the complaint was dismissed.

GOLD BELL, INC. v. S. NAIMAN & SONS, INC.

PACA Docket No. 2-7217.

Decision and order issued July 28, 1987.

Receipt and acceptance—Evidence.

Where respondent fails to offer any evidence disputing evidence attached to verified complaint, finding is made in favor of complainant

Edward M Silverstein, Presiding Officer

Complainant, pro se.

Stephen P. McCarron, Silver Spring, Maryland, for respondent.

Decision and order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks $6,157.50, as reparation, from respondent in connection with numerous lots of vegetables, all being perishable agricultural commodities, shipped in interstate commerce.

Both parties were served with copies of the Department's report of investigation In addition, respondent was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant

As the amount in dispute does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F R. § 47.20) was followed. Under this procedure, the verified pleadings of the parties are considered a part of the evidence of the case, as is the Department's report of investigation. The answer filed in the instant proceeding was not verified, and was not considered as evidence. In addition, the parties were given the opportunity to file further evidence by way of verified statements, but neither party did so. Also, neither party filed a brief.

Findings of Fact

1. Complainant, Gold Bell, Inc., is a corporation whose address is 25 New England Produce Centre, Chelsea, Massachusetts 02150.

2. Respondent, S. Naiman & Sons, Inc., is a corporation whose address is 556 Riverside Drive, Augusta, Maine 04330. At all material times, respondent was licensed under the Act.

3. During the period August 20, through October 15, 1985, complainant, by oral contract, sold 30 lots of broccoli, potatoes, turnips,

and/or onions to respondent for an agreed upon total f.o.b. price of $6,157.50. Respondent received and accepted each lot, but has not paid complainant the $6,157.50.

4. The formal complaint was filed on March 21, 1986, which was within nine months after the causes of action herein accrued.

Conclusions

Complainant alleges that respondent received and accepted 30 lots of vegetables from it, during the period August 20, through October 15, 1985, but has failed to pay it the agreed upon total f.o.b. price of $6,157.50. In support of its complaint, complainant has offered copies of its invoices and copies of signed receipts acknowledging respondent's acceptance of the produce. Respondent has offered no evidence in its defense. Accordingly, we must conclude that complainant has sustained its burden of proof. We, therefore, further conclude that respondent's failure to pay complainant the $6,157.50 owed for the produce is a violation of section 2 of the Act for which reparation plus interest should be awarded.

Order

Within thirty days from the date of this order, respondent shall pay complainant $6,157.50, as reparation, plus interest at the rate of 13% per annum from November 1, 1985, until paid.

Copies of this order shall be served upon the parties.

GRIFFIN & BRAND OF MCALLEN, INC. v. SANSONE & SONS PRODUCE CO., INC.

PACA Docket No. 2-7404.

Order issued July 10, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a timely complaint was filed in which complainant seeks $1,747.00 as reparation from respondent in connection with two transactions in interstate commerce involving perishable agricultural commodities. An answer was filed on behalf of respondent in which it is alleged that the complainant accepted and negotiated a check in the amount of $281.33 as part of an informal liquidation proceeding being conducted by Otto F. Schug, Esq., on behalf of respondent. It was further alleged that all of respondent's creditors participated in this liquidation, and that, had they not, respondent would have gone into bankruptcy.

A review of the record, after correspondence with the parties, by the presiding officer led to the conclusion that complainant's failure to notify respondent or Mr. Schug that it would not participate in the liquidation proceeding and its acceptance and negotiation of the $281.33 check sent to it by Mr. Schug estopped it from prosecuting this action. Complainant was notified of this conclusion by the presiding officer who gave it ten days to object to the issuance of an order dismissing its complaint. As complainant did not respond to the presiding officer's letter, it is concluded that complainant consents to the dismissal of the complaint.

Accordingly, the complaint is dismissed.

HUNT OIL COMPANY a/k/a PLANTATION PRODUCE COMPANY v. BOSTON CELERY COMPANY, INC.

PACA Docket No. 2-7053.

Decision and order issued July 27, 1987.

Delivered sale—Modification of contract.

Complainant sold respondent a load of spinach without any grade specification on a delivered basis. On arrival, respondent complained about the spinach and was granted an allowance of $2.00 per bushel with the understanding that the spinach would be Federally inspected later to verify respondent's personal inspection. The federal inspection showed substantial grade defects but not enough to constitute a breach of a no grade contract. After the inspection, complainant reconfirmed the allowance. Reparation was awarded on the basis of the allowance.

George S. Whitten, Presiding Officer

Complainant, pro se.

Respondent, pro se.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $4,741.20 in connection with the shipment in interstate commerce of a truck load of spinach.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in sec

tion 47.20 in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent did not file an answering statement. Neither party filed a brief.

Findings of Fact

1. Complainant, Hunt Oil Company, is a corporation also known as Plantation Produce Company, whose address is P.O. 1043, Mission, Texas.

2. Respondent, Boston Celery Company, Inc., is a corporation whose address is 40–42 & 50–52 New England Produce Center, Chelsea, Massachusets. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about March 20, 1985, complainant sold to respondent one truckload of 1,000 bushels of spinach at $7.00 per bushel delivered. The load also was to contain one hundred bushels of spinach at no charge. The contract did not specify a U.S. Grade for the spinach.

4. The eleven hundred bushels of spinach were federally inspected at shipping point in Mission, Texas between the hours of 1:00 p.m., March 19, 1985, and 2:45 a.m., March 20, 1985, while being loaded into a trailer with the license number 01745R–Michigan. The inspection disclosed that the spinach was "clean, fresh, mostly good green, no decay". The spinach was shipped early the morning of March 20, 1985, and arrived at respondent's place of business in Chelsea, Massachusetts on Saturday, March 23, 1985.

5. The contract was negotiated through a broker, Zambito Produce Sales, of Philadelphia, Pennsylvania.

6. After arrival of the spinach on March 23, 1985, respondent attempted to contract Zambito and was unable to do so. Respondent then contacted complainant and complained about the poor condition of the spinach on arrival. Complainant then requested that respondent unload and process the spinach, and the parties agreed that respondent would receive an allowance of $2.00 per bushel, with the understanding that the load would be inspected on Monday, March 25, to verify respondent's personal inspection.

7. On Monday, March 25, 1985, at 9:00 a.m., 720 bushel baskets of spinach with no distinguishing marks, stated to be "unloaded from 01745R–Michigan" were federally inspected, and an "Abridged Report Of Fresh Fruit And Vegetable Inspection" was issued which showed in relevant part as follows:

TEMPERATURES: 34 to 38 degrees F

. . .

QUALITY AND CONDITION: Grade defects range from 29 to 37%, average 33%; crushed, broken, crumbled leaves; clusters, and foreign material. Average 1% damage by tan to light brown discolored spots. Average 3% damage by dead wilted leaves. Decay ranges from 2 to 5% in half of samples, remainder none average 2% Bacterial Soft Rot, generally in advanced stages.

GRADE: Fails to grade U.S. No. 1 account grade defects.

REMARKS: Inspection and certificate restricted to product on 12 pallets accessible at time of inspection.

8. The formal complaint was filed on October 11, 1985, which was within nine months after the cause of action herein accrued.

Conclusions

The record in this proceeding clearly reveals that the spinach was sold under a no grade contract on a delivered basis. Under a no grade contract, the amount of grade defects by the federal inspection at destination is not indicative of unmerchantable quality, and therefore does not show a breach of contract. The amount of condition defects present at the time of federal inspection also are not indicative of unmerchantable quality and also cannot be taken to show a breach of the delivered contract. However, the record shows that the $2 per bushel settlement agreement was reconfirmed by the complainant following the Federal inspection, and we conclude that complainant's agreement to allow $2 per bushel based on respondent's personal inspection cannot be voided on the basis of the subsequent federal destination inspection showing no breach of contract.

Respondent contends that the actual agreement between the parties called for an allowance based on respondent's pack out losses, and that there was no agreement for a $2 per bushel allowance, but instead that complainant was merely informed that the losses would amount to at least $2 per bushel. The communications between the parties relative to the modification of the contract were not communicated through the broker, and therefore, we are left to determine the nature of the modifications based solely upon the conflicting contentions of the two parties. We have examined all of the evidence of record on the point, and have concluded that complainant's allegations relative to the nature of the modification reflect what actually occurred.

Respondent also maintains that the spinach was underweight in that a bushel basket of spinach should weigh 25 pounds less the weight of the basket, which respondent alleges to have been 3.71 pounds. Respondent states that the actual weight of the spinach was considerably less than 21 pounds. Complainant admits that the spinach weighed between 16 and 18 pounds, but alleges that such is normal for spinach of the type grown in complainant's area. Respondent did not successfully rebut this allegation. We conclude that the spinach was not underweight.

Respondent accepted the spinach, and is, therefore, liable to complainant for the contract price of $7 per bushel less the $2 per bushel allowance, or a total of $5,000. Respondent has already paid complainant $2,258.80 of this amount which leaves a balance still due and owing of $2,741.20. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $2,741.20, with interest thereon at the rate of 13 percent per annum from May 1, 1985, until paid.

Copies of this order shall be served upon the parties.

KIRK PRODUCE, INC. v. BRUCE CHURCH, INC.
PACA Docket No. 2-7268.
Order issued July 7, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

STAY ORDER

(Summarized)

The Decision and Order issued June 10, 1987, was stayed pending respondent's filing of a petition to reconsider.

LESTER DISTRIBUTING CO. v. EVERGREEN SUPPLY CO.
PACA Docket No. 2-7227.
Decision and order issued July 28, 1987.

Receipt and acceptance by unloading—Damages.

Where respondent received and accepted produce, in absence of proof of damages caused by shipper's breach of contract, it is liable for full contract price.

Edward M. Silverstein, Presiding Officer.

Complainant, pro se.

L. C. John, Detroit, Michigan, for respondent.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A

timely complaint was filed in which complainant seeks $2,408.30, as reparation, from respondent in connection with one transaction involving a partial trucklot of persimmons, a perishable agricultural commodity.

Each party was served with a copy of the Department's report of investigation. In addition, respondent was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant.

As the amount in dispute does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) was followed. Under this procedure, the verified pleadings of the parties are considered a part of the evidence of the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file further evidence by way of verified statements, but neither party did so. Neither party filed a brief.

Findings of Fact

1. Complainant, Lester Distributing Co., is a corporation whose address is 51 So. Locan, Fresno, California 93727.

2. Respondent, Evergreen Supply Co., is a corporation whose address is 20736 Lahser Road, Southfield, Michigan 48034. At all material times, respondent was licensed under the Act.

3. On or about November 21, 1985, in the course of interstate commerce, complainant, by oral contract, sold to respondent a partial trucklot of persimmons consisting of 27/24–25's, 310/27–28's, 29/30–32's, and 2/35–36's, at an agreed price of $8.00 f.o.b. per flat ($2,944.00), plus 35¢ per flat for precooling and palletizing ($128.80) and $22.50 for a temperature recorder, for a total agreed f.o.b. price of $3,095.30. The broker on the transaction was Dean Sakasegawa, George Anderson Co., Salinas, California. Complainant told him that the persimmons were "HARD AS ROCKS AND OF EXCELLENT QUALITY." The persimmons were shipped that same day on board a truck on which the respondent also loaded produce from the Ito Packing Co., Reedley, California, to wit: 388 persimmons, 150 bok choy, and 214 napa.

4. The truck with the above-referenced load arrived at respondent's customer's location in Toledo, Ohio, on Monday evening, November 24, 1985. An inspection was called for on Tuesday, November 26, 1985, but because of the distance from the nearest inspection office (Detroit, Michigan) the inspection could not be done until November 29, 1985. [1] The inspection certificate issued thereafter (No. G 1979) indicates that the persimmons were stacked in respondent's customer's warehouse, that their temperature ranged from 47° F. to 51° F., and that their condition was as follows:

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[1] It is noted that November 28, 1985, was Thanksgiving Day, and a holiday for federal employees.

Respondent accepted the spinach, and is, therefore, liable to complainant for the contract price of $7 per bushel less the $2 per bushel allowance, or a total of $5,000. Respondent has already paid complainant $2,258.80 of this amount which leaves a balance still due and owing of $2,741.20. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $2,741.20, with interest thereon at the rate of 13 percent per annum from May 1, 1985, until paid.

Copies of this order shall be served upon the parties.

KIRK PRODUCE, INC. v. BRUCE CHURCH, INC.

PACA Docket No. 2-7268.

Order issued July 7, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

STAY ORDER

(Summarized)

The Decision and Order issued June 10, 1987, was stayed pending respondent's filing of a petition to reconsider.

LESTER DISTRIBUTING CO. v. EVERGREEN SUPPLY CO.

PACA Docket No. 2-7227.

Decision and order issued July 28, 1987.

Receipt and acceptance by unloading—Damages.

Where respondent received and accepted produce, in absence of proof of damages caused by shipper's breach of contract, it is liable for full contract price.

Edward M. Silverstein, Presiding Officer.

Complainant, pro se.

L. C. John, Detroit, Michigan, for respondent.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A

timely complaint was filed in which complainant seeks $2,408.30, as reparation, from respondent in connection with one transaction involving a partial trucklot of persimmons, a perishable agricultural commodity.

Each party was served with a copy of the Department's report of investigation. In addition, respondent was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant.

As the amount in dispute does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) was followed. Under this procedure, the verified pleadings of the parties are considered a part of the evidence of the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file further evidence by way of verified statements, but neither party did so. Neither party filed a brief.

Findings of Fact

1. Complainant, Lester Distributing Co., is a corporation whose address is 51 So. Locan, Fresno, California 93727.

2. Respondent, Evergreen Supply Co., is a corporation whose address is 20736 Lahser Road, Southfield, Michigan 48034. At all material times, respondent was licensed under the Act.

3. On or about November 21, 1985, in the course of interstate commerce, complainant, by oral contract, sold to respondent a partial trucklot of persimmons consisting of 27/24-25's, 310/27-28's, 29/30-32's, and 2/35-36's, at an agreed price of $8.00 f.o.b. per flat ($2,944.00), plus 35¢ per flat for precooling and palletizing ($128.80) and $22.50 for a temperature recorder, for a total agreed f.o.b. price of $3,095.30. The broker on the transaction was Dean Sakasegawa, George Anderson Co., Salinas, California. Complainant told him that the persimmons were "HARD AS ROCKS AND OF EXCELLENT QUALITY." The persimmons were shipped that same day on board a truck on which the respondent also loaded produce from the Ito Packing Co., Reedley, California, to wit: 388 persimmons, 150 bok choy, and 214 napa.

4. The truck with the above-referenced load arrived at respondent's customer's location in Toledo, Ohio, on Monday evening, November 24, 1985. An inspection was called for on Tuesday, November 26, 1985, but because of the distance from the nearest inspection office (Detroit, Michigan) the inspection could not be done until November 29, 1985. [1] The inspection certificate issued thereafter (No. G 1979) indicates that the persimmons were stacked in respondent's customer's warehouse, that their temperature ranged from 47° F. to 51° F., and that their condition was as follows:

[1] It is noted that November 28, 1985, was Thanksgiving Day, and a holiday for federal employees.

> Mostly firm ripe, some firm, few ripe and light to dark orange color. Calyxes mostly dry and turning brown, some fresh and light green color. Sunken discolored areas range from 7 to 39%, average 21%. Decay in most flats from 4 to 11%, many none, average 4% Blue Mold Rot in early stages.

5. The recommended storage temperature for persimmons is -1° C. (30.2° F.). Storage at room temperature for several days could cause significant damage to persimmons. [2]

6. Respondent has paid complainant $687.00 with respect to the subject shipment.

7. The formal complaint was filed on January 3, 1985, which was within nine months after the cause of action herein accrued.

Conclusions

Respondent's customer, by unloading the persimmons, accepted them. *Theron Hooker Co. v. Ben Gatz Co.*, 30 Agric. Dec. 1109 (1971). This acceptance is attributed to respondent. *Bloxom & Co. v. Gifford & Co., Inc.*, 13 Agric. Dec. 993 (1954). As it accepted the persimmons, respondent is liable for the full purchase price thereof less any damages attributable to a breach of contract committed by complainant. *Rocky Ford Dist. Co. v. Angel Produce*, 29 Agric. Dec. 93 (1970). Respondent has the burden of proving both the breach and its damages by a preponderance of the evidence. *The Growers-Shipper Pot. Co. v. Southw. Prod. Co.*, 28 Agric. Dec. 571 (1969). Even were we to hold that complainant did breach the parties contract by shipping persimmons which did not meet the quality standard called for in the parties' agreement, [3] as respondent has provided no evidence whatsoever as to its damages, we would still have to hold it liable for the full

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[2] Agriculture Handbook No. 66, "The Commercial Storage of Fruits, Vegetables, and Florist and Nursery Stocks," page 48 (1986).

[3] It should be noted that it is not clear that this is so because the federal inspector reported the temperature range of the persimmons as exceeding 47° F. which is far in excess of their recommended storage temperature of 30.2° F. Thus, even taking into consideration the unavailability of inspection service until November 29, 1985, it could very well be true that respondent's customer did not treat the persimmons properly while holding them. If it did not, this would render the complainant's warranty of suitable shipping condition inapplicable. *United Fruit & Produce Co. v. Joe Maggio, Inc.*, 18 Agric. Dec. 1205 (1959). Moreover, we have not been provided with a copy of the tape from the temperature recorder on board the truck, and therefore have some question as to whether transportation conditions were normal. Abnormal shipping conditions also render a shipper's warranty of suitable shipping condition inapplicable. *Omak Fruit Growers v. R.F. Taplett Fruit*, 31 Agric. Dec. 1070 (1972).

contract price. [4]

Therefore, based on the whole of the record before us, we hold that respondent is obligated to complainant for the full contract price of the partial trucklot of persimmons, or $3,095.30. It only has paid complainant $687.00. Therefore, it remains obligated to complainant in the amount of $2,408.30 for the subject persimmons. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

Order

Within thirty days from the date of this order, respondent shall pay to complainant $2,408 30, as reparation, plus interest from January 1, 1986, until paid.

Copies of this order shall be served upon the parties.

NOGALES FRUIT & TOMATO DIST., INC. v. JEROME GROSSMAN d/b/a JEROME BROKERAGE DIST. CO.

PACA Docket No. 2-7037.

Decision and order issued July 27, 1987.

Jurisdiction, perishable agricultural commodity, timely complaint—Accord and satisfaction—Damages, burden of proof—Modification of contract.

Complainant sought reparation for alleged balances due for lots of perishables imported by complainant from Mexico and sold and accepted by respondent at his place of business in Arizona. Respondent subsequently shipped the produce to customers in other states and, following complaints by such customers, paid complainant only a part of the original purchase price. Respondent's counterclaim was dismissed because it was not shown to bear any relationship to a perishable agricultural commodity, nor was there any showing as to the time when any cause of action underlying such counterclaim accrued Respondent's defenses alleging accord and satisfaction and failure of complainant to prove damages were unsustained. However, respondent's defense alleging modification of the contracts to call for payment in reduced amounts was proven by a preponderance of the evidence relative to seven of the transactions, but not as to the remaining three. Complainant was awarded reparation as to these.

George S Whitten, Presiding Officer

Complainant, pro se.

J. Anthony Sedgewick, Nogales, Arizona, for respondent.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

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[4] In its answer, the respondent claims that it renegotiated the contract with the broker. However, there is no evidence that the complainant agreed to this arrangement.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation against respondent in the total amount of $29,807.60 in connection with the shipment in foreign commerce of 10 lots of mixed perishable produce.

Copies of a report of investigation and a supplemental report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant and asserting a counterclaim in the amount of $1,036.80. Respondent's counterclaim alleges that a letter dated April 19, 1985, signed by Regional Director, T. R. Walp, and included as an exhibit to the Department's report of investigation, states that complainant submitted a check for $1,036.80 in payment of "Invoice No. 5051 from Complainant." Respondent requests in its counterclaim that this check be distributed to respondent forthwith. Complainant filed a reply to the counterclaim admitting that on April 12, 1985, it had mailed its check in the amount of $1,036.80 payable to Jerome Brokerage Inc. "on condition that it would be exchanged when Jerome Brokerage Inc., met his responsibility to this Company."

Although the amount claimed in the formal complaint exceeds $15,000.00, the parties have waived oral hearing and the shortened method of procedure provided in § 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement. Respondent filed an answering statement. Complainant did not file a statement in reply. Neither party filed a brief.

Findings of Fact

1. Complainant, Nogales Fruit & Tomato Dist., Inc., is a corporation whose address is P.O. Box 1626, Nogales, Arizona.

2. Respondent, Jerome Grossman, is an individual doing business as Jerome Brokerage Dist. Co., whose address is 1100 Mariposa Road, 103, Nogales, Arizona. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about January 11, 1985, complainant sold to respondent, and shipped from loading point in Mexico to respondent in Nogales, Arizona the following produce:

218 flats	4/5 tomatoes	@ $5.80	or	$ 1,264.40
87 lugs	5/5 tomatoes	@ 5.80	or	504.60
252 crates	small cucumbers	@ 5.80	or	1,461 60
palletization		@ .65	or	362.05

After receiving this produce at his place of business in Nogales, Arizona, respondent sold and shipped the produce to Ford Produce in Raleigh, North Carolina. After arrival of the product in Raleigh, North Carolina respondent was advised that there were problems with the produce and respondent requested an inspection. Respondent was given the results of the inspection by telephone on January 16, 1985, and notified complainant of such results the following day. Complainant authorized a reduction in price on the 4/5 and 5/5 tomatoes to $2.40. Complainant also authorized a $1 per crate reduction in price on the cucumbers. Respondent has paid complainant the adjusted price for this produce in the total amount of $2,303.65.

4. On or about January 13, 1985, complainant sold to respondent, and shipped from loading point in Mexico to respondent in Nogales, Arizona, the following produce:

90 flats	cherry tomatoes	@ $5.85	or	$526.50
	palletization	@ .65	or	45.00

Respondent has paid complainant the entire amount due for this produce.

5. On or about January 17, 1985, complainant sold to respondent, and shipped from loading point in Mexico to respondent in Nogales, Arizona, the following produce:

108 lugs	X Fancy It. squash	@ $7.80	or	$ 842.40
108 lugs	Fancy It. squash	@ 7.80	or	842.40
108 lugs	Medium It. squash	@ 5.80	or	626.40
	palletization	@ .65	or	210.60

The squash was purchased by respondent from complainant subject to market conditions. On the day of purchase respondent advised complainant that the market had declined $3.00 on the fancy Italian squash and $2.00 on the medium Italian squash. Complainant agreed to a deduction of $864.00 from the original price, and respondent has paid complainant the balance of $1,657.80.

6. On or about January 18, 1985, complainant sold to respondent, and shipped from loading point in Mexico to respondent in Nogales, Arizona, the following produce:

144 crates	small cucumbers	@ $8.30	or	$1,195.20
144 crates	plain cucumbers	@ 5.80	or	835.20
	palletization	@ .65	or	187.20

Respondent has paid complainant the full purchase price for this load of produce.

7. On or about January 21, 1985, complainant sold to respondent, and shipped from loading point in Mexico to respondent in Nogales, Arizona, the following produce:

330 flats	5/5 tomatoes	@ $5.80	or	$1,914.00
216 crates	small cucumbers	@ 7.80	or	1,684.80
216 crates	plain cucumbers	@ 5.80	or	1,252.80
78 crates	XL bell peppers	@ 9.80	or	764.40
72 crates	large bell peppers	@ 9.80	or	705.60
108 crates	large It. squash	@ 4.80	or	518.40
	palletization	@ .65	or	663.00

Subsequent to the sale of these commodities complainant agreed with respondent to a price reduction on the 5/5 tomatoes to $5.35 per flat or a total of $148.50. Respondent has paid complainant the balance of the purchase price or $7,345.50.

8. On or about January 20, 1985, complainant sold to respondent, and shipped from loading point in Mexico to respondent in Nogales, Arizona, the following produce:

504 crates	small cucumbers	@ $7.80	or	$3,931.20
144 crates	plain cucumbers	@ 5.80	or	835.20
	palletization	@ .65	or	421.20

Respondent has paid complainant $4,395.60 on this produce which leaves $792.00 still due and owing from respondent to complainant.

9. On or about January 24, 1985, complainant sold to respondent, and shipped from loading point in Mexico to respondent in Nogales, Arizona, the following produce:

84 crates	beans	@ $13.30	or	$ 1,17.20
36 crates	large It. squash	@ 4.80	or	172.80
	palletization	@ .65	or	78.00

This produce was shipped by respondent to Bonanza Produce Company in Knoxville, Tennessee, and upon arrival, respondent was notified that the beans were not U.S. No. 1. Respondent advised complainant of the problem and complainant requested an inspection. The inspection confirmed that the beans were not U.S. No. 1 and with complainant's approval the beans were given away to a children's home and the palletization charge was reduced from 120 packages to 36 packages. Complainant in effect authorized a deduction of $1,161.80 on this produce. Respondent has paid complainant the balance of $206.20.

10. On or about January 24, 1985, complainant sold to respondent, and shipped from loading point in Mexico to respondent in Nogales, Arizona, the following produce:

180 crates	small cucumbers	@ $11.80	or	$2,124.00
108 crates	plain cucumbers	@ 8.80	or	950.40
	palletization	@ .65	or	187.20

Respondent has paid complainant $161.00 for this produce which leaves a balance still due and owing of $2,100.60.

11. On or about January 11, 1985, complainant sold to respondent, and shipped from loading point in Mexico to respondent in Nogales, Arizona, the following produce:

252 crates	small cucumbers	@ $ 3.30	or	$831.60
	palletization	@ .65	or	163.80

Respondent shipped these cucumbers to Ford Produce in Raleigh, North Carolina, and upon arrival was advised by the receiver that the cucumbers were in poor condition. Respondent requested an inspection which was performed on February 24. Respondent informed complainant on February 25 that there was a problem, and complainant agreed to a $1.00 per crate adjustment on the price on the cucumbers. Respondent has paid complainant the total adjusted price of $743.40 for these cucumbers.

12. On or about January 27, 1985, complainant sold to respondent, and shipped from loading point in Mexico to respondent in Nogales, Arizona, the following produce:

40 crates	large bell peppers	@ $15.80	or	$ 632.00
89 crates	medium bell peppers	@ 13.80	or	1,228.20
72 crates	small bell peppers	@ 11.80	or	849.60
	palletization	@ .65	or	130.65

Respondent shipped this product to Kleiman and Hochberg in Bronx, New York on February 27, 1985. The produce was inspected in New York on March 4, 1985, and respondent was notified that there were problems with the product. Respondent in turn notified complainant of the problems and complainant agreed to adjust the purchase price provided it was furnished with "a legible copy of the inspection, account/sale, dump tickets, etc." Respondent has not furnished complainant with an adequate accounting. Respondent issued a check in the amount of $655.85 to complainant in payment for this load of produce but complainant refused to deposit the check. The total original purchase price of $2,840.45 remains due and owing from respondent to complainant.

13. The formal complaint was filed on May 28, 1985, which was within nine months after the cause of action herein accrued.

Conclusions

Respondent's counterclaim alleges that respondent "has not received payment on Invoice No. 5051 from Complainant." The counterclaim also refers to a letter dated April 19, 1985, signed by T. R. Walp of the Fruit and Vegetable Division of this Department, and which is attached

as an exhibit to the Department's report of investigation. Respondent in its counterclaim refers to the fact that such letter states that complainant has submitted a check for $1,036.80 to the Department in payment for Invoice No. 5051, and complainant requests that such check be distributed to respondent. Mr. Walp's letter, in addition to reciting the receipt of the check, states that complainant "requested that we hold the check until this matter is settled." There is no showing that the check or the invoice which it purports to pay has any relationship to a perishable agricultural commodity. Neither is there any showing as to the time at which any cause of action relative to any transaction underlying such invoice might have accrued. See *E.J. Harrison & son v. The A. E. Albert & Sons, Inc.*, 24 Agric. Dec. 884 (1965) and *B. & K. Produce Co., Inc. v. Shipper's Service Co., Inc.*, 33 Agric. Dec. 701 (1974). The counterclaim should be dismissed.

Respondent has raised several defenses to complainant's claims which we will discuss prior to dealing with each of the transactions individually. First, respondent alleges that the informal complaint filed April 19, 1985, relates to only seven partial loads of mixed vegetables and does not mention the shipments of January 18, 24, and February 27, 1985. Respondent further states that the Department received a letter from complainant on the 29th of October, 1985, setting out these three additional invoices and making them a part of their complaint. Respondent alleges that such invoices cannot be considered by the Department because they were "not part of any type of complaint filed within the nine month period required by the PACA." This statement by respondent is not correct. The three invoices were covered by complainant's formal complaint filed May 28, 1985, which was well within the nine month statute of limitations.

Second, respondent alleges that complainant's cashing of respondent's checks amount to an "acceptance" of such checks. Respondent is apparently attempting to claim accord and satisfaction. However, there is no showing that any of the checks were offered in full payment of complainant's invoices, and in the absence of such showing we cannot find that there was an accord and satisfaction relative to any of the transactions herein. See *Kalman Farms v. Bushman Brokerage*, 34 Agric. Dec. 1146 (1975).

The third defense raised by respondent relates to damages. Respondent states that "in order to receive an award, [complainant] has to demonstrate damages. In its complaint [complainant] only indicates unauthorized deductions as the basis for its complaint. At no time does [complainant] make a sworn declaration that it was damaged in any way by the deductions, whether authorized or unauthorized." The record makes it abundantly clear that all of the product which is the subject of the complaint was purchased and accepted by respondent.

Thus, it is elementary that respondent is liable to complainant for the full purchase price of all of the product. There are only two possible defenses to the payment of such purchase price. First, respondent can attempt to show that the contract was in some way modified so as to call for a lesser price. As will be discussed later respondent has succeeded in showing this as to many of the transactions. The second way respondent might have avoided paying the full purchase price would be to prove a breach of contract on the part of complainant as to the goods which respondent accepted, and also to prove damages flowing from such breach. There is absolutely no responsibility resting upon complainant to show damages in this proceeding.

It is clear from the record herein that all of the produce was accepted by respondent at his place of business in Nogales, Arizona. This, of course, means that there is no f.o.b. suitable shipping condition warranty applicable to any of the produce as far as complainant is concerned. Thus, the only way in which respondent could have shown a breach of contract on the part of complainant relative to any of the produce would be to show a breach of the applicable warranty of merchantability, at the latest, at the time of the transfer of the goods into respondent's custody in Nogales, Arizona. Since all evidence as to damage in the produce relates to the condition of the produce at the various destination points to which respondent shipped the produce there is nothing in this record to indicate any breach of contract on the part of complainant.

Respondent submitted a detailed answering statement which was sworn to by Jerome Grossman and also by respondent's salesman Mario Escobedo. In this statement respondent alleges that complainant agreed in numerous instances to adjustments of the original purchase price of the produce. At no point in this proceeding did complainant offer any evidence in rebuttal to these sworn statements. Accordingly, we have concluded that such statements establish by a preponderance of the evidence the truth of the matters alleged therein. Findings of fact 3 through 7 and 9 and 11 reflect this conclusion and are based upon complainant's admissions as alleged in respondent's answering statement. In regard to findings of fact 8, 10 and 12 we find no clear allegations by respondent that complainant authorized the deductions which respondent took relative to the produce covered by such findings of fact. These deductions amounted to a total of $5,733.05. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $5,733.05 with interest thereon at the rate of 13 percent per annum from March 1, 1985, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

NORTHERN FRUIT CO., INC. v. VALLEY BROKERAGE, INC.

PACA Docket No. 2-7530.

Order issued July 29, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

(Summarized)

Respondent, in its answer to the complaint, claimed that settlement had been reached and, as evidence thereof, attached a settlement agreement signed by complainant. Complainant was given an opportunity to dispute the fact that settlement had been reached and did not do so.

Accordingly, the complaint was dismissed.

MORRIS OKUN, INC. v. HARRY'S FOOD SERVICE, INC.

PACA Docket No. 2-7436.

Order issued July 8, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

(Summarized)

A response to the complaint, which in no way could be considered to be an answer, was filed by a certified public account stating that all correspondence concerning respondent's business should be referred to Ship 'N Shore Food Wholesalers, Inc.

Ship 'N Shore Food Wholsalers, Inc. was given an opportunity to file a response to the complaint, but failed to do so.

Accordingly, respondent was ordered to pay complainant, as reparation, $964.00 plus 13 percent interest thereon per annum from February 1, 1986, until paid.

PACIFIC GAMBLE ROBINSON CO., d/b/a PACIFIC FRUIT & PRODUCE CO. v. C. H. ROBINSON COMPANY.

PACA Docket No. 2-7161.

Decision and order issued July 13, 1987.

Burden of proof, respondent—Weight of evidence.

Where respondent satisfies its burden of proving that parties renegotiated contract price, order issued requiring payment of undisputed amount

Edward M. Silverstein, Presiding Officer.

Complainant, pro se.

Owen Gleason, Eden Prairie, Minnesota, for respondent.

Decision and Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks $5,479.20 as reparation from respondent in connection with one transaction, involving broccoli, a perishable agricultural commodity, in interstate commerce.

Each party was served with a copy of the Department's report of investigation. Respondent also was served with a copy of the formal complaint, and filed an answer admitting liability to the complainant in the amount of $3,943.20 but denying any further liability to complainant.

As the amount in controversy was less that $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C F.R § 47.20) was followed. Under this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's report of investigation. Also, the parties were given the opportunity to submit additional evidence by way of verified statements. Respondent submitted an answering statement, and complainant submitted a statement in reply. Respondent also filed a brief.

Finding of Fact

1. Complainant, Pacific Gamble Robinson Co., is a corporation also doing business as Pacific Fruit & Produce Co. whose address is P.O. Box 425, Kingsburg, California 93631.

2. Respondent, C. H. Robinson Company, is a corporation whose mailing address is 1265 Northwest 22nd Street, Miami, Florida 33142. At all material time, respondent was licensed under the Act.

3. On or about April 1, 1985, in the course of interstate commerce, complainant sold a partial trucklot of broccoli to respondent consisting of 192 cartons of size 18 broccoli at $12.85 f.o.b. per carton ($2,467 20) and 240 cartons of size 14 broccoli at $21.45 f.o.b. per

carton ($2,988.00), plus $24.00 for top ice, for a total agreed f.o.b. price of $5,479.20. The broccoli was shipped to respondent in Florida from complainant's location on that same date.

4. On or about April 3, 1985, after noting that the market had declined, respondent contacted complainant and asked for a renegotiation of the price.

5. On or about April 4, 1985, Marvin Farris, who is employed by complainant, in a telephone conversation with Greg Quast, who is em ployed by respondent, agreed to a price reduction as follows: the price of the size 18 broccoli was reduce to $8.85 per carton and the price of the size 14 broccoli was reduced to $9.35 per carton.

6. On or about April 4, 1985, respondent sent complainant a "Confirmation of Adjustment" on which was stated the following:

> " MARVIN - PER OUR CONVERSATION AT 5:45 PM ON 4/4/85 IT IS MUTUALLY AGREED TO BILL THE 192 BROCCOLI 18's AND THE 240 BROCCOLI 14's @ THE FOLLOWING - 192 BROC 18's @ $8.50 PLUS .85¢ [sic] COOLING - 240 BROC 14's @ $8.00 PLUS .85¢ [sic] COOLING."

7. On or about April 5, 1985, respondent sent complainant a "PURCHASE ORDER" indicating that the parties had agreed to adjust the prices to $8.85 for the size 14 broccoli ($2,124.00) and $9.35 for the size 18 broccoli ($1,719.20 plus $24.00 for the top ice for a total agreed price of $3,943.20.

8. The documents referred to in paragraphs 6 and 7 were received by complainant without protest.

9. Respondent received complainant's invoice on or about April 8, 1985. As the invoice contained the originally agreed upon prices rather than the adjusted prices agreed upon on April 4, 1985, respondent returned the invoice with a form letter which, in pertinent part, contained the following information: "You have incorrectly shown the price. Per the agreement, the price should read AS PER MARVIN (KINGSBURG) FIVE PALLETS BROCCOLI 18's @ $9.35, AND FIVE PALLETS BROCCOLI 14's @ $8.85 FOB."

10. On or about April 16, 1985, complainant sent respondent the following telegram signed by Marvin Farris:

> AS PER OUR CONVERSATION REGARDING 9 PLTS OF BROCCOLI LOADED 4/1/85. BROCCOLI WAS LOADED TO YOUR SPECIFICATIONS AT THE AGREED UPON PRICE OF $12.85 FOR THE 18 SIZE AND $12.45 FOR THE 14 SIZE. LATER CONVERSATION WAS THAT I WOULD TRY AND GET THE PRICE ADJUSTED. AS OF YET, I STILL HAVEN'T COME TO SUCH TERMS WITH THE SHIPPER. PLEASE PAY INVOICE IN FULL. THANK YOU.

11. The telegram referred to in paragraph 10 above was received by respondent on April 17, 1985. Greg Quast, respondent's employee, on that same date responded by telegram as follows:

> IN REPLY TO YOUR TELEGRAM WHICH WAS RECEIVED BY US ON 4/17/85 WE TAKE EXCEPTION TO THE FOLLOWING POINTS:
> 1. AS PER THE CONVERSATION BETWEEN MARVIN AN GREG AT 545PM ON 4/4/85 IT IS MUTUALLY AGREED TO BILL THE BROCCOLI 14 COUNT AT 8.85 FOB AND THE BROCCOLI 18 COUNT AT 9.35 FOB.
> 2. WE SENT A CONFIRMATION OF ADJUSTMENT ON 4/4/85 STATING THE ABOVE ADJUSTMENT.
> 3. ON 4/8/85 WE SENT YOU BACK YOUR INCORRECT INVOICE WITH AN ACCOMPANYING INVOICE EXCEPTION LETTER STATING THE PRICES WHICH WERE AGREED TO BY US ON 4/4/85 AT 545PM.
>
> THEREFORE, WE WILL BE PAYING THE PRICES WHICH WERE AGREED UPON ON 4/4/85, 8.85 FOB ON THE BROCCOLI 14 COUNT AND 9.35 FOB ON THE BROCCOLI 18 COUNT.

12. On or about April 23, 1985, respondent issued its check to complainant (no. 494094) in the amount of $3,943.20. Upon receipt thereof, complainant refused to accept it and returned the check to respondent. On three other occasions during the period April 23, 1985 through September 23, 1985, respondent sent the same check to complainant. On each occasion, it was returned to respondent by complainant.

13. On or about May 10, 1985, complainant, pursuant to the Act and the regulations issued pursuant thereto, filed a trust claim against respondent with regard to the subject shipment.

14. On or about May 13, 1985, after receipt of a copy of the May 10, 1985, letter referenced in paragraph 13 above, respondent sent complainant the following telegram:

> IN REFERENCE TO YOUR LETTER WHICH WAS RECEIVED BY US ON 5-13-85 WE MUST TAKE THE FOLLOWING EXCEPTIONS: 1. YOU HAVE ALREADY BEEN PAID ON THE INVOICE NUMBER 432362 ON 4-23-85, OUR CHECK NUMBER 494094. 2. THE AMOUNT WHICH WAS PAID, $3,943.20, IS AS PER OUR AGREEMENT WITH MARVIN FARRIS OF YOUR KINGSBURG CALIFORNIA OFFICE AND IS SUPPORTED BY OUR CONFIRMATION AND DOCUMENTATION OF THIS FILE.
>
> THEREFORE, WE MUST ASK THAT YOU SEND A CORRECTED LETTER TO US AND THE P.A.C.A. STATING THAT THIS LETTER IS IN ERROR AND THAT THE ACCOUNT IS CLOSED.

15. A formal complaint was filed on December 11, 1985, which was within nine months after the cause of action herein accrued.

Conclusions

The dispositive issue in this case concerns whether or not the parties, on April 4, 1985, agreed to a price adjustment as alleged by respondent. It is clear that respondent has the burden of proof on this matter. *See R.D. McGinnis Produce v. Pinder's Prod. Co.*, 28 Agric. Dec. 249 (1969). In support of its allegation, respondent has submitted the affidavit of Greg Quast, its employee who handled the purchase from complainant. Mr. Quast attested to the fact that he renegotiated the originally agreed upon contract price with complainant's employee Marvin Farris on April 4, 1985. The attestation is supported by substantial documentation in the record including, in addition to those documents referred to in the findings of fact above, a copy of the complainant's invoice on which respondent had corrected the prices entered thereon by complainant and indicated that a check had been issued in the amount of the corrected total; and respondent's worksheet for the subject load on which it was indicated that, on April 4, 1985, at 5:45 p.m., the parties had agreed to the renegotiated prices. There is little substantive evidence supporting complainant's allegation that the parties did not agree to renegotiate the prices for the broccoli. Complainant failed to submit an opening statement, and its statement in reply merely consists of a statement of counsel. [1] The only evidence supporting complainant's position is an unsworn letter sent by Marvin Farris to the Department which is contained in the Report of Investigation in which he claims that he never agreed to renegotiate the originally agreed upon contract price. As it was verified, Mr. Quast's statement has more evidentiary weight than does the informal statement made by Mr. Farris to the Department's employees during the course of their investigation of the subject transactions. *See Cal-Mex Vegetable Dist. v. Spinale Bros.*, 18 Agric. Dec. 542, 545 (1959): "As we have stated on numerous occasions, the testimony of witnesses at a hearing is entitled to more weight than statements made informally and included in the report of investigation." [2] Therefore, in view of complainant's failure to submit a verified statement from Mr. Farris in response to the sworn statement of Mr. Quast, we must conclude that Mr. Quast's statement was true. *See Belson v. Spuds, Inc.*, 20 Agric.

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[1] The statement was signed, and attested to, by "Kinne Hawes," who identifies himself as "counsel to Complainant." However, nowhere does Mr. Hawes indicate that he took part in the subject negotiations nor does he state anywhere how he came to have knowledge of the facts contained in his affidavit. We have long held that, under such circumstances, such an affidavit has little, if any, merit. *See Royal Valley Fr. Grws. Assn. v. Hamaday Bros. Food Mkts.*, 37 Agric. Dec. 1925 (1978); and *Earl Cogburn & Sons v. Nat. Prod. Distributors*, 13 Agric. Dec. 677 (1954).

[2] Also *see PACA Doc. No. 4931*, 8 Agric. Dec 598 (1949).

Dec. 1249, 1252 (1961). Consequently, we must hold that respondent has satisfied its burden of proving that the parties agreed to renegotiate the originally agreed upon contract price as submitted by respondent.

We hold, therefore, based on the whole record before us, that respondent is indebted to complainant in the amount of $3,943.20 with respect to the subject shipment. Respondent has offered to pay complainant this amount on at least four occasions since it accepted delivery of the broccoli, but complainant has refused to accept it. Consequently, while we do find that respondent's failure to pay complainant the $3,943.20 is a violation of section 2 of the Act, we do not award it any interest.

Order

Within thirty days from the date of this order, respondent shall pay complainant, as reparation, $3,943.20.

Copies of this order shall be served upon the parties.

PBU ENTERPRISES a/t/a QUALITY DISTRIBUTING OF CALIFORNIA v. CAL-MEX DISTRIBUTORS, INC.

PACA Docket No. 2-7206.

Decision and order issued July 28, 1987.

Burden of proof—Consignment—Acceptance—Damages.

Where complainant fails to prove that consignment agreement superseded original sales agreement, complaint was dismissed.

Edward M. Silverstein, Presiding Officer.

Complainant, pro se.

Respondent, pro se.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks $4,646.20, as reparation, from respondent in connection with one transaction, in interstate commerce, involving honeydew melons, a perishable agricultural commodity.

Both parties were served with copies of the Department's report of investigation. Also, respondent was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant.

As the amount in dispute is less than $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. §

47.20) was followed. Under this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file additional evidence by way of verified statements, however, neither party did so. Respondent filed a brief.

Findings of Fact

1. Complainant, PBU Enterprises, is a corporation also trading as Quality Distributing of California whose mailing address is P.O. Box 20545, San Jose, California 95160.

2. Respondent, Cal-Mex Distributors, Inc., is a corporation whose mailing address is P.O. Box 1717, Chula Vista, California 92012. At all material times, respondent was licensed under the Act.

3. On or about June 5, 1985, in the course of interstate and foreign commerce, respondent sold a trucklot of melons to complainant consisting of 738 cartons of size 6 at $4.50 f.o.b. per carton ($3,321.00) and 792 cartons of size 8 at $4.50 f.o.b. per carton ($3,564.00), plus $22 50 for a Ryan recorder, for a total agreed f.o.b. price of $6,907 50. Subsequent to the sale, the melons were shipped from a loading point in Mexico to complainant's customer, Rosella's Fruit & Produce Co. ("Rosella's"), Seattle, Washington, where they were accepted upon arrival on June 7, 1985.

4. On June 7, 1985, the melons, which had been unloaded off the truck and were tightly stacked in Rosella's warehouse, were the subject of a federal inspection. On the inspection certificate issued thereafter (No. G 095278), the temperature of the melons was listed as follows: "Ranges in various cartons from 51 degrees F. to 56 degrees F." The condition of the melons was noted as follows:

> Mostly firm, some ripe and firm. Generally greenish white to cream color. Average 1% soft melons. Average 2% damage by brown discoloration. In most cartons none, many 1 to 3 melons per carton (17 to 63%, average 12% decay, various types in various stages.

5. After the inspection, the parties renegotiated the contract and agreed to a reduction in the originally agreed upon contract price by 60¢ per carton. Thus, the new total contract price agreed to by the parties was $5,989.50.

6. Subsequent thereto, the exact date being unknown, the respondent sent the complainant a corrected invoice reflecting the total price for the size 6 melons as being $2,878.20, and the total price for the size 8 melons as being $3,088.80. With $22.50 for the Ryan recorder, the corrected invoice total was $5,989.50.

7. On or about June 28, 1985, the complainant paid the respondent $5,989.50 by check no. 3731. [1] This check was recorded as being received by respondent on July 8, 1985.

8. On or about July 17, 1985, complainant sent respondent an account of sales, allegedly, with respect to the subject shipment, and asked respondent to reimburse it $4,646.20. Respondent refused.

9. A formal complaint was filed on December 9, 1985, which was within nine months after the cause of action herein accrued.

Conclusions

Complainant claims that an agreement for it to handle the melons on consignment superseded the parties' original sales agreement. It must prove this allegation by a preponderance of the evidence. *R.D. McGinnis Produce v. Pinder's Prod. Co.*, 28 Agric. Dec. 249 (1969). However, the record is devoid of any proof. It is apparent that the melons were damaged upon arrival in Seattle, but it is not clear to us that this damage was not caused by transportation conditions. [2] In any event, as the melons were unloaded off the truck, it must be concluded that complainant accepted them. *Barkley Co. of Ariz. v. Phil Dattilo & Co.*, 28 Agric. Dec. 537 (1969). Since it accepted them, it was liable to the respondent for the full agreed contract price less any damages resulting from a breach of contract committed by the respondent. *The grower-Shipper Pot. Co. v. Southw. Pro. Co.*, 28 Agric. Dec. 511 (1969). In effect, respondent contends that the parties agreed to reduce the unknown damages to a sum certain, *i.e.* 60¢ per carton. The evidence, which includes the corrected invoice sent to and received by complainant without objection and complainant's check in full payment of that invoice, seems to support respondent's position.

In view of the above, we must hold that complainant has failed to satisfy its burden of proof. Accordingly, the complaint must be dismissed

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

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[1] The check total was $6,649 50, but this included $660.00 related to another transaction between the parties.

[2] We note that the temperature of the melons at the time of the inspections was 51° to 56° F. They should have been transported at temperatures not exceeding 50° F "Protecting Perishable Foods During Transport By Motortruck," Agricultural Handbook 105.

JERRY PEPELIS, d/b/a JERRY PEPELIS PACKING CO. v. JOHN LIVACICH PRODUCE, INC. d/b/a MATRIX MARKETING.
PACA Docket No. 2-7434.
Order filed July 10, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

(Summarized)

Complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim and authorized dismissal of the complaint filed herein.

Accordingly, the complaint was dismissed.

PINNACLE PRODUCE, LTD. v. PRODUCE PRODUCTS, INC.
PACA Docket No. 2-7079.
Decision and order issued July 13, 1987.

F.O.B. sale—Acceptance—Damages.

Complainant sold two carloads of U.S. No. 1 potatoes to respondent on a f.o.b. basis and shipped the cars to respondent's customers After shipment, respondent resold the cars to a third party and was found to have accepted them as a result of such resale. Federal inspection after arrival showed good delivery as to one car and a breach of contract as to the other, assuming transportation services and conditions were normal. It was held that since respondent failed to prove damages resulting from any breach, it was unnecessary to determine whether transportation services and conditions were normal. Reparation was awarded for the balance of the purchase price on both cars.

George S. Whitten, Presiding Officer.

Complainant, pro se.

Respondent, pro se.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $5,258.21 in connec-

tion with the shipment in interstate commerce of two carloads of potatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation In addition, the parties were given an opportunity to file evidence in form of sworn statements. Complainant filed an opening statement Respondent did not file an answering statement Complainant filed a brief.

Findings of Fact

1. Complainant, Pinnacle Produce, Ltd., is a corporation whose address is 2458 East Road, 5 North, Monte Vista, Colorado.

2. Respondent, Produce Products, Inc., is a corporation whose address is 231 East Imperial Highway, Suite 230, Fullerton, California. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about April 16, 1985, complainant entered into a contract with respondent to ship to respondent's customer in St. Louis, Missouri, one railway carload consisting of 1,250 U.S. No. 1, 100 pound burlap sacks of 1 7/8 inch to 8 ounce Russet Burbank potatoes at $7.00 per hundredweight, or $8,750 00 f.o.b.

4. The potatoes were federally inspected between the hours of 10:45 a.m. and 5:45 p.m. on April 18, 1985, at shipping point and found to grade U S. No. 1. The potatoes were shipped on April 18, 1985, and while en route, respondent sold the potatoes to Five Star Produce, Inc., of Monte Vista, Colorado.

5. The potatoes arrived at destination in St. Louis, Missouri, and on April 26, 1985, at 7:00 a.m., were federally inspected while still on the railway car. Such inspection showed temperatures at the doorway "A" end of the car to be "Top-46 degrees F. Bottom-47 degrees F." Quality was stated to be "Mature, clean and generally fairly well shaped. Grade defects average 5%, cuts, shatter bruises and misshapen." Condition was stated to be "Generally firm. Average 2% damage by sunken discolored areas. Average 2% damage by Internal Black Spot. Average 1% damage by Net Necrosis. Average less than 1% soft rot." Grade was stated to be "Meets quality requirements but fails to grade U.S. No. 1, 2 inch minimum or 4 ounce minimum." The inspection was stated to be restricted to all layers of the three stacks

nearest the doorway at each end of the car made accessible by applicant.

6. On or about May 7, 1985, complainant sold to respondent for shipment to respondent's customer in St. Louis, Missouri, one railway carload consisting of 1,250 U.S. No. 1, 100 pound burlap sacks of 1 7/8 inch to 8 ounce Russet Burbank potatoes at $7.25 per hundredweight, or $9,062.50 f.o.b. The potatoes were federally inspected at shipping point between the hours of 8:30 a.m. on May 6, 1985, and 4:00 p.m. on May 7, 1985. Such inspection showed the potatoes to grade U.S. No. 1.

7. The potatoes were shipped on May 7, 1985, and while en route, respondent sold the potatoes to Five Star Produce, Inc., of Monte Vista, Colorado.

8. After arrival at the place of business of respondent's customer in St. Louis, Missouri, the potatoes were federally inspected on May 14, 1985, at 8:40 a.m. Such inspection showed the temperatures to be "Doorway: "A" end of car "Top-56 degrees F. Bottom-57 degrees F." Condition was stated to be "Generally firm. Average 3% damage by Net Necrosis. From 5 to 18% average 12% damage by sunken discolored areas with underlying flesh discolored. Average less than 1% soft rot. Most stock have sprouts from just emerging up to 1/8 inch in length not affecting grade." The inspection was stated to be restricted to all layers of 3 stacks nearest doorway, each end of the car.

9. The formal complaint was filed on November 1, 1985, which was within nine months after the cause of action herein accrued.

Conclusions

In our opinion, the evidence clearly establishes that respondent resold both carloads of potatoes to Five Star Produce, Inc., of Monte Vista, Colorado, after the cars were underway. As to the first car, Five Star changed the billing to the parent company (A.M. Macheco & Co., Inc.) of the original consignee (Spud Packers, Inc.), but the destination address remained otherwise the same. As to the second car, the original consignee was A.M. Macheco & Co., Inc., and was never changed. Of course, respondent's resale of the potatoes amounted to an acceptance and made respondent liable to complainant for the full f.o.b. purchase price of the potatoes less any damages proven by respondent to have resulted from any breach of contract on the part of complainant. See *Berks-Lehigh Co-op. v. Adams*, 15 Agric. Dec. 677 (1956).

The condition of the potatoes in the first carload does not indicate a breach of contract for potatoes sold on a U.S. No. 1 basis under f.o.b. terms. Accordingly, respondent is liable to complainant for the balance of the purchase price of these potatoes. The federal inspection at destination which applied to the second carload of potatoes is indicative of a

breach of contract assuming transportation services and conditions were normal. However, it is not necessary for us to discuss the issue of proper transportation services and conditions since respondent has failed to establish damages resulting form any breach. The need for establishing such damages was called to respondent's attention during the informal stages of this proceeding, however, no accounting of the resale of the potatoes was ever submitted by respondent. In the absence of such an accounting, and in view of the limited extent of the condition factors shown by the federal destination inspection, no damages could be awarded even assuming a breach were established. See, *Anthony Brokerage, Inc. v. The Auster Company, Inc.*, 38 Agric. Dec. 1643 (1979). Respondent has already paid complainant $12,554 29 for the two carload of potatoes. This leaves a balance still due from respondent to complainant of $5,258.21. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $5,258.21, with interest thereon at the rate of 13% per annum from June 1, 1985, until paid.

Copies of this order shall be served upon the parties.

PIZZO PRODUCE, INC. v. CHRIS SPIRIDIS d/b/a EASTERN FARMERS EXCHANGE CO.

PACA Docket No. 2-7168.

Decision and order issued July 27, 1987.

Burden of proof—Consignment, accounts of sale—Evidence.

Where respondent accepted 7 truckloads of mixed produce on consignment, it had burden to account. Its failure to submit any evidence in this regard was fatal to respondent's defense.

Dennis Becker, Presiding Officer

Robert A. DeSanto, Vineland, New Jersey, for complainant.

Respondent, pro se.

Decision and Order by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $19,061.64 in connection with the shipment in interstate commerce of seven truckloads of mixed perishable produce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

Although the amount claimed in the formal complaint exceeds $15,000.00, the parties waived oral hearing, and the shortened method of procedure provided in section 47.20 of the Rules of Practice(7 C.F R. § 47.20) is applicable. Pursuant to the procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Neither party did so. Neither did either party file a brief.

Findings of Fact

1. Complainant, Pizzo Produce, Inc., is a corporation with a business address of P. O. Box 42, Rosenhaven, New Jersey.

2. Respondent, Chris Spiridis, is an individual doing business as Eastern Farmers Exchange Company, with a business address at the time of the transactions involved in this proceeding at 561 Acorn Street, Unit 5, Deer Park, New York. At the time of the transactions involved in this proceeding, respondent was licensed under the provisions of the Act.

3. Between June 29, 1985, and July 23, 1985, complainant consigned to respondent seven truckloads of mixed fruit and vegetables. The truckloads of mixed fruits and vegetables were shipped from complainant's place of business to respondent, where they were received and accepted. Respondent paid complainant $21,189.36 with respect to these transactions.

4. Lord Produce Broker's, Inc., Bayshore, New York, acted as broker in the transactions involved.

5. A formal complaint was filed on January 21, 1986, which was within nine months of the time the causes of action herein arose.

Discussion

Complainant has proved that it shipped to respondent seven truckloads of mixed fruits and vegetables between June 29, 1985, and July 23, 1985. It has also proved that respondent accepted delivery of the seven truckloads of fruits and vegetables, and paid a total of $21,189.36. Having received the goods, respondent had the burden to show the net proceeds it received after sale, since the goods were consigned to it. We reject complainant's claim that they were sold to respondent because Lord Produce Broker's, Inc., the broker for these transactions, stated the goods were consigned, and the statements of an ostensible independent third party are entitled to great weight. *Kern Ridge Growers v. T.J. Power & Co.*, 48 Agric. Dec. 425 (1981).

Although respondent claimed in his answer that he received the goods on consignment, he made no statement as to whether there were accounts of sale with respect the transactions. Therefore, we cannot ascertain what prices may have been fetched for the goods involved. The report of investigation of the Department contains what appear to be accounts of sale. However, since respondent has neither related them to his defense nor sworn to their accuracy, we cannot give them evidentiary value. In view of this, it is necessary to determine the total amount which complainant should have received. Complainant claims it should have received a total of $40,251.00, and actually got $21,189.36, leaving $19,061.64 unpaid. Respondent has not adequately defended against this claim. In view of the above, we conclude that reparation should be awarded in the amount of $19,061 64, plus interest. Respondent's failure to pay this amount is a violation of section 2.

Order

Within 30 days from the date of this order, respondent shall pay the complainant $19,061.64 plus interest at the rate of 13% per annum from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

VITTORIO PODESTA v. LOUIE PRODUCE CO.

PACA Docket No. 2-7361.

Order issued July 8, 1987.

Sharlene W. Lassiter, Presiding Officer

James A. Soto, Nogales, Arizona, for complainant.

Ronald T. Wasserman, Torrance, California, for respondent

Order issued by Donald A. Campbell, Judicial Officer.

Order [Continuance]

(Summarized)

This proceeding was continued until the Department receives proper notification that respondent's proceeding now pending in the United States Bankruptcy Court has been closed or dismissed, or converted to straight bankruptcy, or that the debts have been discharged.

RANCHO VERGELES, INC. v. RICHARD SHELTON d/b/a MID VALLEY BROKERAGE COMPANY.

PACA Docket No. 2-7081.

Order issued July 7, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

STAY ORDER

(Summarized)

The order previously issued was stayed pending complainant's filing of an answer to respondent's petition for reconsideration.

STANLEY BROS., INC. v. RUSTY'S PRODUCE MARKET.

PACA Docket No. 2-7535.

Order issued July 24, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

(Summarized)

In its answer to the complaint, respondent admitted the material allegations, including the indebtedness to complainant. However, respondent claimed that the amount of indebtedness had been reduced by adjustments.

Complainant was given an opportunity to show cause why an order should not be issued limiting its recovery to the reduced amount, but did not do so.

Respondent was ordered to pay complainant, as reparation, $2,707.75 plus 13 percent interest thereon per annum from August 1, 1986, until paid.

STEVCO, INC. v. C. B. MARCHANT & CO., INC.

PACA Docket No. 2-7162.

Decision and order issued July 13, 1987.

Rejection, failure to communicate—Commercial unit, acceptance of—Responsibility of shipper after rejection—Buyer fails to prove damages.

Where buyer accepts produce by failing to communicate rejection and by acceptance of portion of commercial unit and fails to prove breach and damages resulting therefrom, buyer is liable for full contract price.

Edward M. Silverstein, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Respondent, pro se.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which the complainant seeks reparation in the amount of $21,835 50 against respondent in connection with five transactions in interstate commerce involving grapes, a perishable agricultural commodity.

Each party was served with a copy of the Department's report of investigation. The respondent also was served with a copy of the formal complaint, and filed an answer thereto admitting liability to the complainant in the amount of $10,780.50, but denying liability with respect to the remaining portion of the $21,835.50 sought by the latter. On July 16, 1986, we issued an "Order Requiring Payment of Undisputed Amount" with respect to the respondent's admission of liability.

Although the amount in dispute exceeded $15,000.00, the parties waived oral hearing. Thus, this matter was handled under the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20). Under this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Complainant submitted an opening statement, respondent submitted an answering statement, and complainant submitted a statement in reply. Complainant also filed a brief.

Findings of Fact

1. Complainant, Stevco, Inc., is a corporation whose mailing address is P.O. Box 6157, Beverly Hills, California 90212.

2. Respondent, C. B. Marchant & Co., Inc., is a corporation whose mailing address is P.O. Box 8144, Columbia, South Carolina 29202. At all material times, respondent was licensed under the Act.

3. On or about July 3, 1985, complainant, by oral contract sold to respondent 240 lugs of grapes as follows: 120 Cardinals at $8.00 per lug f.o.b. ($960.00) and 120 Thompson seedless at $10.00 per lug f.o.b. ($1,200.00), plus 85¢ per lug for palletization and cooling ($204.00), for a total agreed f.o.b. price of $2,364.00. The broker on the transaction was Papazian Distributing Co., Inc. ("Papazian"), Salinas, California. The grapes were shipped to respondent which received and accepted them.

4. On or about July 4, 1985, complainant, by oral contract, sold to respondent 240 lugs of Thompson seedless grapes at $10.00 per lug

f.o.b. (2,400.00), plus 85¢ per lug for palletization and cooling ($204.00), for a total agreed f.o.b. price of $2,604.00. The broker on the transaction was Papazian. The grapes were shipped to, and received and accepted by respondent.

5. On or about July 4, 1985, complainant, by oral contract, sold to respondent 240 lugs of grapes as follows: 120 Cardinals at $8.00 per lug f.o.b. ($960.00) and 120 Thompson seedless at $10.00 per lug f.o.b. ($1,200.00), plus 85¢ per lug for palletization and cooling (204.00), for a total agreed f.o.b. price of $2,364.00. Papazian was the broker on the transaction. The grapes were shipped to respondent which received and accepted them.

6. On or about July 6, 1985, complainant, by oral contract, sold to respondent 1,260 lugs of grapes as follows: 360 lugs of Cardinals at $9.00 per lug f.o.b. ($3,240.00) and 900 lugs of Thompson seedless at $8.75 per lug f.o.b. ($7,875.00), plus $22.50 for a Ryan recorder and 70¢ per lug for palletization and cooling ($882.00), for a total agreed f.o.b. price of $12,019.50. Papazian was the broker on the transaction. The grapes, which were shipped to respondent, were received and accepted by it.

7. On or about July 9, 1985, complainant, by oral contract, sold to respondent 240 lugs of grapes as follows: 120 Cardinals at $9.00 per lug f.o.b. ($1,080.00) and 120 lugs of Thompson seedless at $10.00 per lug f.o.b. ($1,200.00), plus 85¢ per lug for palletization an cooling ($204.00), for a total agreed f.o.b. price of $2,484.00. The broker on the tiansaction was Papazian. The grapes were shipped to respondent which received and accepted them.

8. The formal complaint was filed on January 16, 1986, which was within nine months after the cause of action herein accrued.

Conclusions

The dispute in this case focuses on two of the five transactions described in the Findings of Fact. The first of these concerns the 240 lugs of Thompson seedless grapes described in paragraph 4 of the Findings of Fact. Respondent claims to have rejected the grapes. However, complainant denies receiving notice of that rejection and respondent has failed to adduce evidence that a proper rejection was made. *See Jarson v. Tavilla*, 30 Agric. Dec. 1360, 1364 (1971): "Notice of rejection must be made in clear and unmistakable terms***." Accordingly, we must conclude that it did not make a proper rejection of the 240 lugs. Since it did not reject them, respondent must be concluded to have accepted the grapes. [1] *Wilbur Sonny Parker v. VBJ Packing*, 42

[1] In any event, there is no evidence that complainant breached the parties' contract. Therefore, the rejection would have been arbitrary. *See Womack Produce v. Echols*, 20 Agric. Dec. 895 (1961).

Agric. Dec. 1217 (1983). Thus, it is obligated to complainant for the full contract price less any provable damages resulting from a breach of contract committed by complainant. Respondent has offered no evidence indicating that complainant breached the parties' contract, nor did it offer any evidence that it suffered any damages. We must conclude, therefore, that it is obligated to complainant for the full contract price for that shipment, or $2,604.00. *Irving Acres v. Handwerk Farms*, 29 Agric. Dec. 741 (1970).

The second dispute concerns a portion of the load of grapes shipped to respondent on July 6, 1985, described in paragraph 6, of the Findings of Fact, to wit: the 900 lugs of Thompson seedless grapes. Respondent has proven that complainant may have breached the parties' contract both as to size and as to brand. However, even were we to conclude that it had, we could not rule in respondent's favor because we must conclude that respondent accepted the grapes and failed to prove that it was damaged by the alleged breaches. Although respondent alleges that it rejected the 900 lugs of Thompson seedless grapes shipped on July 6, 1985, it admits accepting the 360 lugs of Cardinal grapes which were part of the same shipment. [2] As it accepted part of the shipment, it must be concluded to have accepted it all. *See* 7 C.F.R. § 46.43(ii); and *Salinas Lettuce Coop v. Larry Ober Co.*, 39 Agric. Dec. 65 (1980). Since it must be concluded that respondent accepted the whole of the July 6, 1985, shipment of grapes, we must conclude that it is obligated to complainant for the full contract price of that shipment less any provable damages resulting from a breach of contract committed by complainant. However, as noted above, respondent has failed to adduce any evidence by which we could conclude that it suffered any damages resulting from the possible breaches. It must be concluded therefore that respondent is obligated to complainant for the full contract price for this shipment also, or $12,019.50.

The sum of the contract prices for all five of the shipments involved in this case is $21,835.50. We have already issued an order concerning $10,780.50 of this amount. Thus, only $11,055.00 remains in dispute. We find that respondent's failure to pay complainant the $11,055.00 is a violation of the Act for which reparation plus interest should be awarded.

[2] Parenthetically, we note that, although complainant claims that it did not "accept" this rejection, such a choice is not on within a shipper's purview. Once a rejection is communicated to a shipper, it *must* take responsibility for the load and, if the rejection is arbitrary, look to the buyer for damages. *Bruce Church, Inc v. Tested Best Foods Div.*, 28 Agric. Dec. 377 (1969).

Order

Within thirty days from the date of this order, respondent shall pay to complainant $11,055.00, as reparation, plus interest at the rate of 13% per annum from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

SUNKIST GROWERS, INC. v. NICK PENACHIO.

PACA Docket No. 2-7546.

Order issued July 29, 1987.

Dennis Becker, Presiding Officer.

Robin McCarthy, Van Nuys, California, for Complainant.

Respondent, pro se.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

(Summarized)

Complainant notified the Department that respondent tendered a check in full settlement of complainant's claim and authorized dismissal of the complaint filed herein.

Accordingly, the complaint was dismissed.

SUNWORLD INTERNATIONAL, INC. v. INTERCOAST MARKETING, INC.

PACA Docket No. 2-7505.

Order issued July 10, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

(Summarized)

In its answer to the complaint, respondent admitted the material allegations, including the indebtedness to complainant. However, respondent claimed that the indebtedness was at a reduced amount.

Complainant was given an opportunity to dispute respondent's contention as to the reduced amount of the indebtedness, but did not do so.

Respondent was ordered to pay complainant, as reparation, $29,501.70 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

R. F. TAPLETT d/b/a R. F. TAPLETT FRUIT AND COLD STORAGE COMPANY v. VALLEY BROKERAGE, INC.

PACA Docket No. 2-7504.

Order issued July 10, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

(Summarized)

In its answer to the complaint, respondent claimed that a settlement had been reached. Complainant was given an opportunity to deny that settlement had been reached, but failed to do so.

Accordingly, the complaint was dismissed.

P. TAVILLA CO., INC. v. S. NAIMAN & SONS, INC.

PACA Doctet No. 2-7229.

Decision and order issued July 28, 1987.

Receipt and acceptance—Burden of proof.

Where buyer receives and accepts produce, it is liable for full contract price.

Edward M. Silverstein, Presiding Officer.

Complainant, pro se.

Stephen P. McCarron, Silver Spring, Maryland, for respondent.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which the complainant seeks $3,599.25 in connection with 21 shipments of fruits and vegetables, all being perishable agricultural commodities, in interstate commerce.

Each party was served with a copy of the Department's report of investigation. Respondent also was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant.

Since the amount in controversy does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) was followed. Under this procedure, the verified pleadings of the parties are considered a part of the evidence of the case, as is the Department's report of investigation. The answer filed in the instant case was not verified, and was not considered as evidence. In addition, the parties were given the opportunity to file further evi

dence by way of verified statements, but neither party did so. Also, neither party filed a brief.

Findings of Fact

1. Complainant, P. Tavilla Co., Inc., is a corporation whose address is 78–80 New England Produce Center, Chelsea, Massachusetts 02150.

2. Respondent, S. Naiman & Sons, Inc., is a corporation whose address is 556 Riverside Drive, Augusta, Maine 04330. At all material times, respondent was licensed under the Act.

3. During the period August 27, through October 15, 1985, complainant, by oral contract, sold 21 loads of avocados, beans, buttercup squash, butternut squash, cabbage, Indian corn, cucumbers, chicory, corn eggplant, gourds, limes, leeks, peppers, red peppers, radishes, white sweet potatoes, and/or zucchini to respondent for a total agreed f.o.b. price of $3,599.25. Respondent received and accepted each lot, but has not paid complainant the $3,599.25.

4. The formal complaint was filed on March 25, 1986, which was within nine months after the causes of action herein accrued

Conclusions

Complainant alleges that respondent received and accepted 21 lots of fruits and vegetables from it, during the period August 27, through October 15, 1985, but has failed to pay it the agreed upon total f.o.b. price of $3,599.25. In support of its complaint, complainant has submitted the invoices concerning these transactions, and has alleged, in its verified complaint, that respondent received and accepted the subject produce. Although respondent generally denied these allegations in its unverified answer, it has offered no evidence in support of its position. Accordingly, we must conclude that the complainant has sustained its burden of proof. We, therefore, further conclude that respondent's failure to pay complainant the $3,599.25 for these 21 shipments is a violation of section 2 of the Act for which reparation plus interest should be awarded.

Order

Within thirty days from the date of this order, respondent shall pay complainant $3,599.25, as reparation, plus interest at the rate of 13% per annum from November 1, 1985, until paid.

Copies of this order shall be served upon the parties.

TAVILLA SALES COMPANY v. LOUIS KALECK d/b/a KALECK DISTRIBUTING COMPANY.

PACA Docket No. 2-7118.

Decision and order issued July 13, 1987.

F.O.B. sale, open—Suitable shipping condition warranty—Protection agreement, failure to submit adequate accounting—Counterclaim, abandoned.

Complainant purchased a load of watermelon from respondent f.o b. on an open basis with 100% protection against market decline and shrink, and with price to be determined after completion of sale. Complainant accepted the melons and reworked them prior to having them Federally inspected. It was found that the amount of shrink claimed to have resulted from the reworking did not indicate a breach of contract by respondent, nor did the results of the federal inspection substantiate a breach. Complainant dumped melons in violation of the Department's regulations, and failed to account for an additional large portion of the melons. The protection agreement was, therefore, voided. Respondent's informal counterclaim was abandoned when respondent filed its answer, and therefore no award could be made in respondent's favor.

George S. Whitten, Presiding Officer.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $2,316.50 in connection with the shipment in interstate commerce of a truckload of watermelons.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

Findings of Fact

1. Complainant is a partnership composed of Larry Nienkerk, Inc., Cutsinger Entrps., Inc., Stephen Tavilla, Paul J. Tavilla, Anthony Tavilla, Richard J. Tavilla, Joseph P. Tavilla, and Ernest B. Tavilla, doing business as Tavilla Sales Company, whose address is 131 Terminal Court, South San Francisco, California.

2. Respondent, Louis Kaleck, is an individual doing business as Kaleck Distributing Company, whose address is P.O. Box 1432, McAllen, Texas. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On or about June 8, 1984, respondent sold to complainant one truckload of Florida Stripe Watermelons on an open basis with 100% protection against market decline and shrink, and with price to be determined after final completion of sale. The watermelons on the truck weighed 43,530 pounds and the truck was already in California at the time of the sale. Complainant received the watermelons on Saturday, June 9, 1984, in San Jose, California, and unloaded such watermelons at that time. Complainant caused the watermelons to be reworked and loaded into bins, and such melons were delivered on June 11, 1984, to complainant's customer in Sacramento, California, where they were rejected. The melons were then taken to the place of business of Chick's Produce, Inc., in Sacramento, California, where a portion of such melons were federally inspected with the following results, in relevant part:

WHERE INSPECTED: Applicant's Dock & Trailer Van.

Condition of Equipment: Temperature control unit not in operation.

Products Inspected: Round striped WATERMELONS in fiberboard bins, with no distinguishing marks. Applicant's count 28 bins.

Condition of Load: Partly unloaded. Bins loaded to approximately 1/4 length of trailer – 1 and 2 layers and 2 rows. Unloaded lot: stacked at the above location.

Temperature of Product: Each lot: In various locations 64 to 66 degrees.

Condition: Each lot: Generally firm. Damage by sunburn in most samples ranges from 1 to 2 melons, in some samples none, average 6%. Damage by bruises averages 2%. Mechanical damage average 2%. Damage by overmature 2%. Decay in most samples range from 1 to 2 melons, some none, average 5% Phytophora Rot in advanced stages.

Remarks: No trailer license plate on van. Applicant states unloaded lot was unloaded from the above described trailer.

5. Complainant submitted invoices showing the payment of freight for the watermelons in the amount of $2,421.00, and showing the resale on a delivered basis of 10,000 pounds of melons at 5¢ per pound, or $500.00, 7,000 pounds at 5¢ per pound, or $350.00, and 5,000 pounds at 4¢ per pound, or $200.00. Complainant also submitted an invoice from Chick's Produce, Inc., showing expenses for inspection of $35.50 and labor for unloading of $60.00. Complainant also submitted an invoice from Gutto Citrus in San Jose, California, for $850.00 for unspecified expenses.

6. An informal complaint was filed on January 28, 1985, which was within nine months after the cause of action alleged herein accrued.

Conclusions

Complainant brings this action to recover the excess of its expenses over the amounts realized from the resale of a portion of the watermelons which it received from respondent. The initial question to be answered is whether the watermelons were sold by respondent to complainant or whether complainant received them on a consignment basis. The language used throughout this proceeding by complainant and respondent relative to the contract strongly suggests that neither party understands the difference between a consignment and a sale on an open basis. However, the purchase order issued by complainant clearly describes a sale and not a consignment, and we have found that such was the agreement between the parties. The terms of the sale were f.o.b., and therefore the question arises as to whether these melons made good delivery under such f.o.b. terms. Complainant accepted the melons by unloading them on Saturday, June 9. In addition, complainant reworked the melons at that time prior to any inspection by a neutral party. However, complainant alleges that as a result of the reworking less than 4,000 pounds, or less that 9% of the watermelons, were discarded. Destination tolerances for U.S. No. 1 watermelons (these watermelons were sold without any reference to U.S. grade) allow 12% for watermelons which fail to meet the requirements of the grade. This 12% would be increased somewhat for purposes of determining whether good delivery was made. It seems evident therefore that if we accept complainant's allegations as to the reworking, the watermelons did not contain sufficient defects at time of delivery and acceptance to show a breach of contract. The federal inspection on June 12, shows defects only approximately 2% in excess of what would be allowed for good delivery, and in view of the time that expired between such inspection and time of delivery the inspection also is not evidence of a breach of contract.

Complainant's accounting shows the resale of only 22,000 pounds of watermelons. If we deduct the 4,000 pounds of watermelons which complainant states that it discarded in the reworking of the melons on June 9, and deduct 17% (the total percentage of damage shown by the June 12, federal inspection) from the remaining 39,530 pounds of melons, we are left with 10,809 pounds of melons for which complainant has supplied no accounting whatsoever. In addition, it should be noted that complainant discarded the 4,000 pounds of melons on June 9, without benefit of any dump certificate in violation of the Department's regulations. See 7 C.F.R. § 46.22. The protection agreement is voided. See *Demarco Produce Co., Inc. v. J.R. Cortes & Co.*, 39 Agric. Dec. 1256 (1980).

During the informal stages of this proceeding respondent filed a counterclaim against complainant in connection with the subject watermelon transaction in the amount of $2,316.50. When respondent filed its formal answer it abandoned its counterclaim against complainant. If respondent had not abandoned its counterclaim we would most certainly have made an award in respondent's favor based upon the market value of 43,530 pounds of watermelons less reasonable expenses. The complaint should be dismissed.

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

VEG-A-MIX v. TOM LANGE COMPANY, INC.

PACA Docket No. 2-7281.

Decision and order issued July 27, 1987.

Commercial unit resale—Suitable shipping condition—Effect of delayed inspection—Damages.

Where truckload of perishables was unloaded at several destinations, first act of unloading constituted acceptance. Inspection two days after acceptance did not show condition at time of delivery because inspection was too late.

Thomas Oliveri, Newport Beach, California, for complainant.

LeRoy W. Gudgeon, Northfield, Illinois, for respondent.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $1,450.80 in connection with the sale in interstate commerce of a truckload of mixed perishable produce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are

considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement and respondent filed an answering statement. Both parties filed briefs.

Findings of Fact

1. Complainant, Veg-A-Mix, is a corporation with a business address at P.O. Box 1186, Castroville, California.

2. Respondent, Tom Lange Company, Inc., is a corporation with an address at P.O. Box 4701, Springfield, Illinois. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On December 10, 1985, complainant sold to respondent a truckload of cauliflower and brussel sprouts for a total contract price of $6,368.10, f.o.b. The goods were shipped from California to respondent's customers in St. Louis, Missouri, on December 10, 1985, and arrived on December 16, 1985, where they were received and accepted.

4. With respect to 156 cartons of 12 count cauliflower delivered to respondent's customer, Adolf & Ceresia Produce Company, a federal inspection was held on December 16, 1985, at 10:40 a.m. It showed in pertinent part as regards the condition of the cauliflower that:

> Curds mostly white and compact. Jacket leaves fresh and green. From 1 to 3 head per carton, average 17% damage by tan to brown discolored curds. No decay.

As a result of the condition defects, complainant granted an allowance of $1.15 per carton for the 156 cartons of cauliflower sold to Adolf & Ceresia.

5. 312 cartons of the 12 count cauliflower were sold to United Fruit & Produce Co., St. Louis, Missouri, late on the afternoon of December 16, 1985. United Fruit noticed the deteriorated quality of the cauliflower and asked for an inspection on December 17, 1985, which was given on December 18, 1985, at 10:00 a.m. It showed in pertinent part as regards condition that:

> Curds mostly white and compact. Jacket leaves fresh and green. From 2 to 6 heads per carton, average 31% damage by tan to brown discolored curds. In half of cartons none, remainder of cartons, 1 or 2 heads, average 6% decay. Bacterial Soft Rot generally in early stages.

Based on the results of this inspection, respondent granted United Fruit an adjustment, and took a $4.65 adjustment on the purchase price per carton charged by complainant.

7. A formal complaint was filed on April 28, 1986, which was within nine months of the time the cause of action herein arose.

Discussion

There is no issue with respect to the brussel sprouts which were sold to respondent by complainant. Neither is there any issue with respect

to many of the cartons of cauliflower sold to respondent by complainant, although it is suspected that they showed a considerable amount of tanning and browning, in the same manner as did those cartons which were inspected. With respect to the cauliflower sold to Adolph & Ceresia, complainant and respondent resolved the condition problem when complainant granted an allowance to the purchase price. We are concerned only with respect to the 312 cartons sold to United Fruit & Produce Company late on the afternoon of December 16, 1985. Since respondent accepted through its own customers a portion of the truckload of produce shipped, it is deemed under perishable agricultural commodities law to have accepted the entire commercial unit. *Salinas Lettuce Farmers Cooperative v. Larry Ober Company*, 39 Agric. Dec. 65, 65-70 (1980). Therefore, respondent has the burden to show that it suffered damages because the cauliflower was not in suitable shipping condition when shipped from California. Respondent contends that the inspection held by Adolf & Ceresia on December 16, 1985, as enlarged upon by the inspection held by United Fruit on December 18, 1985, shows clearly the progress of the deterioration of the cauliflower involved. Complainant contends that the inspection held on December 18, 1985, is too remote in time from the date of receipt and acceptance to have any probative value. We agree with complainant. Furthermore, for the suitable shipping condition warranty to apply, transportation conditions must be normal. *John M. Evans Produce Co. v. D.L. Piazza Co.*, 18 Agric. Dec. 1452, 1454 (1959); 7 C.F.R. § 46.24(j). Six days transport by truck from California to St. Louis is at least two days too long, and voids the warranty of suitable shipping condition.

In view of the above, we find that the $4.85 per carton adjustment taken by respondent without agreement by complainant was unauthorized. The total amount deducted for the 312 cartons was $1,450.80. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation should be awarded with interest.

Order

Within 30 days from the date of this order, respondent shall pay the complainant $1,450.80 with interest thereon at the rate of 13% per annum from January 1, 1986, until paid.

Copies of this order shall be served upon the parties.

VENTURA COUNTY FRUIT GROWERS, INC. v. VALLEY BROKERAGE, INC.

PACA Docket No. 2-7503.

Order issued July 29, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

(Summarized)

Respondent, in its answer to the complaint, claimed that settlement had been reached. To support its claim, respondent attached to its answer a signed settlement agreement. Complainant was given an opportunity to show cause why its complaint should not be dismissed and did not do so.

Accordingly, the complaint was dismissed.

J. A. WOOD CO.-VISTA, INC. v. ROCKY PRODUCE, INC.

PACA Docket No. 2-7484.

Order issued July 10, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

(Summarized)

Complainant notified the Department that respondent tendered a check in full settlement of complainant's claim and authorized dismissal of the complaint filed herein.

Accordingly, the complaint was dismissed.

REPARATION DEFAULT ORDERS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER
(Summarized)

ACE HI PACKING, INC. v. FRUIT DISTRIBUTING CORP.

PACA Docket No. RD-87-332.

Order issued July 20, 1987.

STAY ORDER

The default order previously issued was stayed pending receipt of complainant's answer to respondent's petition to reopen after default

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ARKANSAS VALLEY PRODUCE OF TEXAS INC. v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.

PACA Docket No. RD-87-366.

Default order issued July 23, 1987.

Respondent was ordered to pay complainant, as reparation, $19,767.50 plus 13 percent interest thereon per annum from September 1, 1986, until paid.

ASSOCIATED POTATO GROWERS INC. v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.

PACA Docket No. RD-87-369.

Default order issued July 23, 1987.

Respondent was ordered to pay complainant, as reparation, $6,075.00 plus 13 percent interest thereon per annum from September 1, 1986, until paid.

W. E. BAILEY & SON INC. a/t/a WAYNE E. BAILEY PRODUCE CO. v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.

PACA Docket No. RD-87-348.

Default order issued July 2, 1987.

Respondent was ordered to pay complainant, as reparation, $650.00 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

BILLY THE KID PRODUCE INC. v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.

PACA Docket No. RD-87-367.

Default order issued July 23, 1987.

Respondent was ordered to pay complainant, as reparation, $1,206.25 plus 13 percent interest thereon per annum from August 1, 1986, until paid.

J. R. BROOKS & SON v. J. SEGARI AND CO. INC.

PACA Docket No. RD-87-363.

Default order issued July 22, 1987.

Respondent was ordered to pay complainant, as reparation, $11,413.85 plus 13 percent interest thereon per annum from September 1, 1986, until paid.

COLORADO POTATO GROWERS EXCHANGE v. McALLEN PRODUCE CO. INC.

PACA Docket No. RD-87-358.

Default order issued July 21, 1987.

Respondent was ordered to pay complainant, as reparation, $2,267.50 plus 13 percent interest thereon per annum from August 1, 1986, until paid.

DE BRUYN PRODUCE CO. v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.

PACA Docket No. RD-87-344.

Default order issued July 1, 1987.

Respondent was ordered to pay complainant, as reparation, $11,852.00 plus 13 percent interest thereon per annum from September 1, 1986, until paid.

GROWERS PACKING COMPANY v. McALLEN PRODUCE CO. INC.

PACA Docket No. RD-87-359.

Default order issued July 22, 1987.

Respondent was ordered to pay complainant, as reparation, $2,309.50 plus 13 percent interest thereon per annum from May 1, 1986, until paid.

GWIN WHITE & PRINCE INC. v. U. S. FOOD MARKETING INC.

PACA Docket No. RD-87-364.

Default order issued July 22, 1987.

Respondent was ordered to pay complainant, as reparation, $22,082.30 plus 13 percent interest thereon per annum from November 1, 1986, until paid.

JOHN K. HARMON d/b/a HARMON COMPANY PRODUCE v. JOSE A. YRIGOYEN d/b/a JOE YRIGOYEN.

PACA Docket No. RD-87-338.

Default order issued July 6, 1987.

Respondent was ordered to pay complainant, as reparation, $9,540.74 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

HORWATH AND CO. INC. a/t/a GONZALES PACKING COMPANY v. PAT WOMACK INC.

PACA Docket No. RD-87-371.

Default order issued July 23, 1987.

Respondent was ordered to pay complainant, as reparation, $48,344.10 plus 13 percent interest thereon per annum from December 1, 1986, until paid.

D. H. JOHNSON & SONS INC. v. THE PIONEER FRUIT & COMMISSION CO.

PACA Docket No. RD-87-353.

Default order issued July 21, 1987.

Respondent was ordered to pay complainant, as reparation, $15,138.00 plus 13 percent interest thereon per annum from December 1, 1986, until paid.

MARTORI BROS. DISTRIBUTORS v. FARO VITALE AND SONS INC.

PACA Docket No. RD-87-232.

Order issued July 8, 1987.

ORDER REOPENING AFTER DEFAULT

Prior to the issuance of a Default Order, respondent filed a motion to reopen this proceeding after default and allow the filing of an answer.

It was concluded that the motion was filed within a reasonable time and good reason was shown why the relief requested should be granted. Accordingly, respondent's default in the filing of an answer was set aside.

[New docket number is PACA 2-7573.—Editor]

MAYFLOWER MARKETING CORP. v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.

PACA Docket No. RD-87-343.

Default order issued July 1, 1987.

Respondent was ordered to pay complainant, as reparation, $9,402.30 plus 13 percent interest thereon per annum from September 1, 1986, until paid.

RONALD C. MCMANUS AND WILLIAM A. WARREN d/b/a WARREN AND MCMANUS PRODUCE CO. v. JOHN E. REYNA d/b/a REYNA BROTHERS PRODUCE & TRUCKING.

PACA Docket No. RD-87-354.

Default order issued July 21, 1987.

Respondent was ordered to pay complainant, as reparation, $20,158.20 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

M.E.G. DISTRIBUTING, INC. v. R & A PRODUCE DIST. CO., INC.

PACA Docket No. RD-87-283.

Order issued July 8, 1987.

ORDER DENYING RESPONDENT'S MOTION TO REOPEN AFTER DEFAULT

Respondent failed to file an answer to the complaint, therefore a Default Order was issued against it.

Respondent filed a motion, 84 days after the time for filing its answer, seeking the setting aside of its default. However, this motion was

not filed within a reasonable time after the time for filing its answer had expired. Accordingly, its motion to reopen was denied.

ROBERT L. MEYER d/b/a MEYER TOMATOES v. McALLEN PRODUCE CO. INC.

PACA Docket No. RD-87-357.

Default order issued July 21, 1987.

Respondent was ordered to pay complainant, as reparation, $39,947.50 plus 13 percent interest thereon per annum from September 1, 1986, until paid.

MILLS DISTRIBUTING COMPANY v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.

PACA Docket No. RD-87-346.

Default order issued July 1, 1987.

Respondent was ordered to pay complainant, as reparation, $1,768.75 plus 13 percent interest thereon per annum from September 1, 1986, until paid.

NEW ZEALAND GOURMET INC. v. HERBS NOW.

PACA Docket No. RD-87-362.

Default order issued July 22, 1987.

Respondent was ordered to pay complainant, as reparation, $6,229.00 plus 13 percent interest thereon per annum from January 1, 1986, until paid.

NOKOTA PACKERS INC. v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.

PACA Docket No. RD-87-370.

Default order issued July 23, 1987.

Respondent was ordered to pay complainant, as reparation, $1,810.00 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

J. R. NORTON COMPANY v. McALLEN PRODUCE CO. INC

PACA Docket No. RD-87-360.

Default order issued July 22, 1987.

Respondent was ordered to pay complainant, as reparation, $1,892.00 plus 13 percent interest thereon per annum from August 1, 1986, until paid.

PISMO-OCEANO VEGETABLE EXCHANGE v. RUSSO FARMS, INC.

PACA Docket No. RD-87-210.

Order issued July 20, 1987.

ORDER REOPENING AFTER DEFAULT

Respondent filed a motion to reopen this proceeding after default and allow the filing of an answer.

It was concluded that the motion to reopen was filed within a reasonable time and that good reason was shown why the relief requested in the motion should be granted. Accordingly, respondent's default in the filing of an answer was set aside.

Respondent filed a brief, but failed to file an answer to the complaint. Respondent was given 10 days to file such answer.

[New docket number is PACA 2-7585.—Editor]

PLAINVIEW PRODUCE INC. v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.

PACA Docket No. RD-87-368.

Default order issued July 23, 1987.

Respondent was ordered to pay complainant, as reparation, $2,750.00 plus 13 percent interest thereon per annum from September 1, 1986, until paid.

SEALD-SWEET SALES INC. v. HOMER ROYSE d/b/a TWIN CITY PRODUCE.

PACA Docket No. RD-87-355.

Default order issued July 21, 1987.

Respondent was ordered to pay complainant, as reparation, $1,625.00 plus 13 percent interest thereon per annum from August 1, 1986, until paid.

TAMPICO PRODUCE INC. v. SILVERIO LAMAS d/b/a VALLEY GROWN PRODUCE SALES.

PACA Docket No. RD-87-361.

Default order issued July 22, 1987.

Respondent was ordered to pay complainant, as reparation, $4,575.00 plus 13 percent interest thereon per annum from May 1, 1986, until paid.

TEX-SUN PRODUCE INC. v. JACK T HUMPHREYS d/b/a HALLMARK PRODUCE COMPANY

PACA Docket No RD-87-349.

Default order issued July 2, 1987.

Respondent was ordered to pay complainant, as reparation $2,455 23 plus 13 percent interest thereon per annum from June 1 1986, until paid

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TEX-SUN PRODUCE INC v. VER-TEX INC

PACA Docket No RD-87-351.

Default order issued July 2, 1987

Respondent was ordered to pay complainant, as reparation [illegible] plus 13 percent interest thereon per annum from June 1, [illegible] paid.

GLENWOOD TUCKER d/b/a TUCKER PRODUCE COMPANY v. TEX-SUN PRODUCE, INC., and/or DANA R. JOHNSON d/b/a [illegible] FOOD MARKETING

PACA Docket No. RD-87-274.

Order issued July 24, 1987.

CORRECTED ORDER REOPENING AFTER DEFAULT

An order was issued June 22, 1987, setting aside the default of respondent Tex-Sun Produce, Inc. That order contained the following language: "...the proposed answer submitted by respondent [illegible] is hereby ordered filed." As no answer has been received, that language was erroneous. The order should have provided respondent Tex-Sun Produce, Inc., with the opportunity to file an answer. Accordingly, the June 22, 1987, Order is corrected to provide as follows

Accordingly, the default in the filing of an answer by respondent Tex-Sun Produce, Inc., is set aside. Respondent Tex-Sun Produce, Inc., shall have ten days from receipt of this order in which to file an answer. The failure to file an answer within that period of time will result in the issuance of a default order against it.

Respondent Tex-Sun Produce, Inc., was given ten days from the date of this order in which to file an answer to the complaint.

[New docket number is PACA 2-7569.—Editor.]

VALDES FARMS IN v. PARADISE TROPICAL PRODUCE INC.

PACA Docket No. RD-87-365.

Default order issued July 22, 1987.

Respondent was ordered to pay complainant, as reparation, $27,059.45 plus 13 percent interest thereon per annum from May 1, 1986, until paid.

VALLEY CENTRAL SALES INC. v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.

PACA Docket No. RD-87-345.

Default order issued July 1, 1987.

Respondent was ordered to pay complainant, as reparation, $7,125.00 plus 13 percent interest thereon per annum from September 1, 1986, until paid.

VALLEY CENTRAL SALES INC. v. STOOPS DISTRIBUTING INC.

PACA Docket No. RD-87-350.

Default order issued July 2, 1987.

Respondent was ordered to pay complainant, as reparation, $16,710.00 plus 13 percent interest thereon per annum from October 1, 1986, until paid.

VENIDA PACKING INC. v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.

PACA Docket No. RD-87-347.

Default order issued July 1, 1987.

Respondent was ordered to pay complainant, as reparation, $1,284.00 plus 13 percent interest thereon per annum from September 1, 1986, until paid.

TONY VITRANO COMPANY v. MARGARET M. BUTCHER d/b/a BUTCHER'S PRODUCE CO.

PACA Docket No. RD-87-352.

Default order issued July 21, 1987.

Respondent was ordered to pay complainant, as reparation, $30,484.75 plus 13 percent interest thereon per annum from October 1, 1986, until paid.

WASHBURN POTATO CO. v. MELON PRODUCE INC.

PACA Docket No RD-87-356.

Default order issued July 21, 1987.

Respondent was ordered to pay complainant, as reparation, $10,720 00 plus 13 percent interest thereon per annum from November 1, 1986, until paid.

In re: MARY JENKINS.

P.Q. Docket No. 307.

Decision and order filed June 2, 1987.

Moving imported restricted articles from airport without inspection—Civil penalty—Default.

Lori Monfort, for complainant

Respondent, pro se.

Decision issued by Edward H. McGrail, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151–164a and 167) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent violated Subpart 319.37 of the regulations promulgated thereunder (7 C.F.R. Subpart 319.37). Copies of the complaint and rules of practice governing proceedings under the Act were served by certified mail on respondent by the Hearing Clerk on February 23, 1987.

Respondent was informed in the complaint and in the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after receipt of the complaint, that failure to deny, otherwise respond or plead specifically to any allegation in the complaint would constitute an admission of such allegation, and that failure to file an answer within the prescribed time would constitute an admission of the allegations in the complaint and waiver of hearing. The letter of service also advised respondent that failure to request an oral hearing within the time for filing an answer would constitute a waiver of an oral hearing.

Respondent's failure to file an answer within the time prescribed by section 1.136(a) of the rules of practice (7 C.F.R. § 1.136(a)) constitutes an admission of the allegations in the complaint pursuant to section 1.136(c) of the rules of practice (7 C.F.R. 1.136(c)) and a waiver of hearing pursuant to section 1.139 of the rules of practice (7 C.F.R. § 1.139).

Additionally, respondent's failure to deny or otherwise respond to the allegations in the complaint constitutes an admission of such allegations, pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)) and a waiver of hearing pursuant to section 1.139 of the rules of practice (7 C.F.R. § 1.139). Because no basis for a hearing exists, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

Findings of Fact

1. Mary Jenkins, respondent, is an individual whose business address is Jungle Orchids, 2335 N.W. 20th Street, Miami, Florida 33142.

2. On or about December 1, 1984, respondent violated section 319.37-4(b) of the regulations (7 C.F.R. § 319.37-4(b)) by moving restricted articles, bromeliads imported from Quatemala, from the Miami airport to Jungle Orchids, respondent's place of business, without inspection.

Conclusion

Respondent failed to respond in a timely manner and failed to deny the allegations of the complaint. By reason of the Findings of Fact set forth above, respondent has violated the Act and the regulations promulgated thereunder. Therefore, the following order is issued.

Order

Mary Jenkins hereby assessed a civil penalty of seven hundred fifty dollars ($750.00), which shall be payable to the "Treasurer of the United States" by certified check or money order and which shall be sent to "USDA, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403" within thirty (30) days from the effective date of this order. Respondent shall indicate on the certified check or money order that payment is in reference to P. Q. Docket No. 307.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless respondent appeals to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This decision and order became final July 10, 1987.—Editor.]

In re: KIM PRODUCE.

P.Q. Docket No. 335.

Order filed July 24, 1987.

Order by Victor W. Palmer, Acting Chief Administrative Law Judge.

DISMISSAL OF COMPLAINT

Upon the motion of complainant and "for good cause shown", the complaint herein is dismissed without prejudice.

In re: JUDITH PETERS.

P.Q. Docket No. 65.

Decision and order filed May 11, 1987.

Importation of fruits, vegetables and eggs into United States from Mexico—No permit applied for or obtained—Civil penalty.

Respondent transported eggs, potatoes and several kinds of fruit from Mexico into the United States, without having applied for or obtained a permit. As a licensed attorney and a frequent traveler between the United States and Mexico, respondent was undoubtedly aware of the rules and regulations governing the introduction into the United States of agricultural products from Mexico. Although respondent was given several opportunities to declare the restricted items at the border, she made three negative declarations. Respondent was assessed a civil penalty in the amount of $500.00, in part as a deterrent to potential violators

Joseph Pembroke, for complainant

Respondent, pro se.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

This is a proceeding instituted under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111 and 120), the Federal Plant Pest Act, as amended (7 U.S.C. § 150aa, *et seq.*) and the Act of August 20, 1912 (Plant Quarantine Act), as amended (7 U.S.C. §§ 161 and 162) (Acts), and the regulations promulgated thereunder (7 C.F.R. § 319.56, *et seq.* and § 321 *et seq.* and 9 C.F.R. § 94.6 *et seq.*) by complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, on March 14, 1985.

The complaint alleged that on or about October 21, 1984, respondent imported amounts of eggs, potatoes and various amounts of fruits from Mexico to San Ysidro, California, without a permit being applied for or obtained, as required, in violation of section 94.6(g) (9 C.F.R. § 94.6(g)), section 321.4(a) (7 C.F.R. § 321.4(a)) and section 319.56-2(e) (7 C.F.R. § 319.56-2(e)), respectively, of the regulations.

Respondent's answer, filed May 10, 1985, essentially denied the violations of the complaint but in averring that the eggs, potatoes and fruits cited in the complaint were purchased in the United States, it is admitted that these items were transported as alleged.

Oral hearing in this matter was held before the undersigned on April 22, 1987, at San Diego, California. Complainant was represented by Joseph P. Pembroke, Esq., Office of the General Counsel, United States Department of Agriculture. A *pro se* representation was made by the respondent, who is a qualified attorney practicing in the State of California. Submission of findings of fact or briefs were not requested or ordered. For convenience, the pertinent parts of the applicable statutes and regulations are set forth in the Appendix hereto.

Findings of Fact

1. Judith April Peters, herein referred to as respondent, is an individual whose address is 978 Van Nuys Street, San Diego, California. Respondent is a qualified attorney practicing in the State of California. (Complaint, para. I; Answer; Tr. 48) [1]

2. Respondent has owned a home in Rosarito Beach, Mexico, for the past six years and, during this period, has traveled to and from this home twice monthly, leaving Friday and returning Sunday, via the United States Border Inspection Station at San Ysidro, California. (Tr. 48, 54)

3. The United States Border Inspection Station at San Ysidro, California, is manned by United States Customs Officers and Immigration and Naturalization inspectors whose responsibility it is to check automobiles and trucks entering the United States to determine: whether such vehicles contain items on which customs' duty must be paid; to determine citizenship of the vehicle occupants; to determine whether narcotics, marijuana or dangerous drugs are being transported; and to obtain a declaration from vehicle occupants as to whether plants, meat and poultry products, fruits, vegetables, food and animals are being brought into the United States from Mexico. Signs to this effect are posted at the inspection station in both English and Spanish. (Tr. 8-9, 20-21, 25-26)

4. The United States Border Inspection Station at San Ysidro, California is also manned by officers of the Animal and Plant Health Inspection Service, United States Department of Agriculture (APHIS) whose purpose is to enforce statutes and regulations issued by the United States Department of Agriculture pertaining to the importation of meat and poultry products, fruits and vegetables, from quarantined areas or countries. Mexico is listed as a quarantined country for these purposes. (Tr. 19-20) (7 C.F.R. § 319.56)

5. The purpose of these statutes and regulations is to prevent the introduction of diseased plant pests, or any infectious substances, which would be injurious to the cattle, produce, or farm economy of the United States. (See Appendix; Tr. 8-9)

6. The Mediterranean Fruit Fly, and the Mexican Fruit Fly, which in the past caused millions of dollars worth of damage to citrus crops in Florida and California, the Avocado Seed Weevil and Avocado Moth; the Golden Nematode which infects potatoes; and Newcastle's Poultry Disease, a lethal avian influenza, are examples of the pests and diseases the statutes and regulations are designed to prevent from being intro-

[1] Reference to exhibits are designated "CX" and "RX" to indicate those submitted by complainant and respondent, respectively. References to the hearing transcript are designated "Tr.".

duced into the United States from designated quarantine areas, or countries. (Tr. 9-11)

7. Vehicles entering the United States from Mexico travel along what are described as primary lanes to the inspection station. The procedure followed by U.S. Customs Service Officers at the inspection station at San Ysidro, California, is to inquire of the vehicle occupants if they have brought anything from Mexico they wish to declare. The occupants of a vehicle have the opportunity at that time to make a negative, or positive, declaration If a positive declaration of possessing agricultural products is made at that point, the occupant is given a choice of returning the prohibited items to Mexico, or having the items confiscated. No fine is assessed. If a negative declaration is made, the Customs Officer may request an inspection of the vehicle. Due to the number of vehicles which pass through the primary lanes, approximately one million per month, Customs Officers do not request inspection of each and every vehicle. If undeclared prohibited items within the jurisdiction of the United States Department of Agriculture are found, the Customs Officer will write up an inspection referral ticket, then direct the vehicle to the secondary lane where it will be inspected by an APHIS Officer. (CX-1, 2; Tr. 14, 20-21, 27-29, 31, 39, 42-44)

8. The vehicle occupant may again make a positive, or negative, declaration to the APHIS Officer. Following this declaration, the vehicle is inspected and if found to contain prohibited items within the jurisdiction of the United States Department of Agriculture, the vehicle occupant is given the option of paying a fine or requesting a hearing on the matter. If items were brought into Mexico from the United States with some identification stamped on the items and returned the same day, probably no penalty would be assessed. If items were not hidden, the penalty would be $25.00. If hidden, the penalty would be $50.00 Both fines are payable at the time of infraction and inspection. (CX-2; Tr. 14, 23, 28, 30-31, 39, 44-46)

9. The Multiple Inspection Referral slip initiated by the Customs Officer contains the vehicle license number, the number of persons in the vehicle, the undeclared items found, and the date of the crossing in code. The code is for each day and is changed daily. Additionally, a photocopy of the driver's license is made, as well as a report of the incident. (CX-1, 2; Tr. 21, 23, 40)

10. On October 21, 1984, respondent, accompanied by her two children, reentered the United States from Mexico via the San Ysidro, California, Border Inspection Station, driving a green Mercedes Benz bearing California license plate #245 RRT. Respondent made a negative declaration to the Customs Officer upon being stopped in the primary lane. The Customs Officer inspected the vehicle and found undeclared eggs, as well as fruits and vegetables, in the trunk of the vehicle.

A Multiple Inspection Referral ticket was made out and respondent was directed to enter the secondary lane to be inspected by an APHIS Officer. (CX-1, 2; Tr. 24-25, 41)

11. Upon inspection by the APHIS Officer, he found thirty eggs, four potatoes which were described as having soil clinging to them, two lemons, three pears, four apples, five pomegranates, eight plums and twenty-nine limes. The record shows that respondent had made three prior negative declarations pertaining to these items. (CX-1; Tr. 22, 27, 32, 39-40, 53)

12. In the early 1980's, an infestation of the Mediterranean Fruit Fly cost millions of dollars to eradicate. It would cost millions of dollars in damage to the citrus industry should this infestation again become intrenched in the United States. Newcastle's Disease cost some $17 million dollars to eradicate. (Tr. 10-11)

13. Respondent made three negative declarations and knowingly violated the Acts and regulations promulgated as cited in the complaint. (CX-1, Tr. 10, 21-22, 27)

Discussion and Conclusions

The ultimate questions here are whether the prohibited items brought by the respondent from Mexico into the United States were actually purchased in the United States for transportation into Mexico and then returned to the United States on the day in question If so, could they be considered as an exception to prohibitions pertaining to items of an agricultural nature transported from a quarantine area, or country The answer to both of these questions must be answered in the negative.

At first glance it may appear that such violations as are found here are trivial. However, because of recent crises occurring in the United States, the violations lose any aspect of triviality. The purpose of the programs within the jurisdiction of APHIS, USDA, is to prevent the introduction and spread of foreign diseases and pests into the United States and thereby protect this country's agricultural well-being In the past the fruit fly infestations in Florida, Texas and California have cost millions of dollars to eradicate and many millions of dollars in property and income loss The 1983 California Medfly infestation reached the same multi-million dollar proportions, as did the outbreak of citrus canker in Florida within the past several years. Additionally, the lethal avian influenza which occurred in 1983 resulted in the destruction of millions of chickens costing Federal and State governments millions of dollars in direct costs.

One of the methods of preventing the introduction of diseases and pests into the United States is the inspection of cars and baggage of travelers entering the United States via border inspection stations. Experience has shown that it is not the commercial operators shipping

products into this country who cause the introduction of the diseases and pests. Rather, it is the individual who has a small amount of fruit, vegetables or meat products that come from an unknown source that is the greatest threat to this country's agricultural sector. For fiscal year 1986, 17,000 border violations of the regulations resulted in over one-half million dollars in civil penalties. Travelers are required to make a declaration as to whether they are transporting prohibited agricultural items, and are further given opportunity to amend their first declaration. In the matter under consideration here, respondent made three negative declarations before APHIS Officers sought to impose a civil penalty for undeclared prohibited items.

The respondent, an attorney, has been traveling twice monthly for the past six years from her residence in San Diego, California, to her house in Rosarito Beach, Mexico, via the United States Border Inspection Station at San Ysidro, California. With respondent's experience and knowledge, there can be no doubt that she was well aware of the rules and regulations pertaining to the introduction into the United States of agricultural products emanating from a designated quarantine country. Additionally, each United States Border Inspection Station has signs posted, in both English and Spanish, advising the entering traveler of the agricultural products which are prohibited from being brought into the United States. Mexico has been designated as one of the quarantine countries from which fruits and vegetables may not be transported into the United States without having a permit (7 C.F.R. § 319.56). Nor is Mexico listed as an exempt country from which poultry products, or eggs, may be shipped without authorization (7 C.F.R. § 6(a)(2)).

Respondent admits in answer to the complaint and at oral hearing that the items cited in the complaint were brought into the United States on October 21, 1984, via the San Ysidro, California, Border Inspection Station. Documents of record also corroborate the date and list of items brought into the United States. Nevertheless, respondent testified that it was her practice when she went to Mexico to empty out the refrigerator at the San Diego, California residence and transport perishable items for use at her home in Mexico. The reverse was true on her return trip to San Diego, California several days later.

The APHIS Officer at the San Ysidro Border Inspection Station testified that if the agricultural products brought into the United States were identified with some recognizable marking of an American company and had only been in Mexico for one day, the possibility existed that they would be passed at the border station. Beyond the one day period and without such markings, such agricultural items are subject to the prohibiting regulations. The items transported by the respondent bore no American company markings. In fact, they bore no markings at all. However, even assuming such items were purchased in the United

States and had some distinguishing marks, they had been in Mexico for over a period of one day. Thus, the violations are present.

I find that very little credence can be placed in respondent's testimony. Initially, it must be noted that respondent was traveling with two children and that the items in questions were allegedly brought from the United States. However, it is difficult to comprehend why respondent would transport a total of thirty (30) eggs from her residence in San Diego, California to be used in the home in Mexico and return thirty eggs to her residence in San Diego several days later. Certainly it was not contemplated the respondent and her two children would consume this number of eggs during their stay in Mexico. On the other hand, the eggs would not have lost their edibility had they been left in the refrigerator in her San Diego residence for the period of time respondent sojourned in Mexico. The same can be said of the twenty-nine (29) limes which were among the prohibited items transported by respondent into the United States. Nor can we consider the four (4) potatoes with soil clinging to them to have been purchased in the United States Such soil clinging potatoes are not found in the ordinary grocery store in the United States It can only be concluded that these items, as well as the remaining fruits, were purchased in Mexico and not in the United States, and were therefore violations of the statutes and regulations cited in the complaint.

Sanction

Complainant here seeks a civil penalty of $250 based on APHIS policy existing at the time of the violations. However, the undersigned is not restricted or limited to that amount since the Secretary has the authority to assess a civil penalty of no more than $1,000 (21 U.S.C. § 122). Initially, it must be stated that there are no extenuating or mitigating circumstances to be found in this record.

Prior to 1983, the Secretary had no civil penalty authority and violations such as here had to be submitted to the various United States attorneys' offices, where they received a low priority for prosecution. In granting the Secretary of Agriculture the authority to assess a civil penalty, Congress recognized the importance of preventing the spread of foreign diseases and pests in the United States and sought to achieve the Congressional goal by authorizing the Secretary to impose civil penalties not exceeding $1,000:

> Civil penalties, on the other hand, can be imposed administratively, insuring that the violator will be dealt with in a timely and effective manner. Moreover, a monetary penalty is more real to most than a distant and lengthy legal process that may or may not be instituted and that sometimes may be overcome. Civil penalties can thus become not only an effective enforcement tool but a potential deterrent as well. (H.R. Rep. No. 97-875, 97th Cong., 2d Sess. 3-4, 7.)

The policy of effective enforcement and potential deterrence has been followed in many cases before the Secretary. In *In re Richard Duran Lopez*, 44 A.D. ___ (October 7, 1985, Slip opinion, p. 8), it was recognized that there may be mitigating circumstances which would lessen the civil penalty. However, they dealt with situations where a positive declaration was made:

> Accordingly, the voluntary declaration of the prohibited article prior to the beginning of a search of the car or possession, should be regarded as a mitigating circumstance reducing the minimum civil penalty to $250.
>
> * * * * *
>
> In view of the great number of cases that will be filed under this Act, and the small amount of the civil penalties that will be imposed, it seems appropriate to provide an economic incentive to respondents not to force the Department to hold unnecessary hearings where there is no real basis for challenging the allegations of the complaint. Where as here, a respondent files an answer which does not require the Department to hold a hearing, the minimum civil penalty should be reduced from $500 to $250. (Id. at p. 14)

Here there were no mitigating circumstances or voluntary declarations. Rather, there were three negative declarations. For all of the above reasons, the following order is issued.

Order

Respondent Judith April Peters is hereby assessed a civil penalty of five hundred dollars ($500). The respondent shall send a certified check or money order payable to "The Treasurer of the United States" to Joseph P. Pembroke, Esq., Office of the General Counsel, Room 2402 South Building, United States Department of Agriculture, Washington, DC 20250-1400.

The order shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This decision and order became final July 2, 1987.—Editor.]

APPENDIX

Applicable Statutes

7 U.S.C. § 150aa. Definitions

(a) "Secretary" means the Secretary of Agriculture of the United States or any other person to whom authority may be delegated to act in his stead.

(b) "Properly identified employee of the Department of Agriculture" means an employee of that Department authorized to enforce the s of the Plant Quarantine Act, and wearing a suitable badge tion, or otherwise properly identified.

(c) "Plant pest" means any living stage of: Any insects, mites, nematodes, slugs, snails, protozoa, or other invertebrate animals, bacteria, fungi, other parasitic plants or reproductive parts thereof, viruses, or any organisms similar to or allied with any of the foregoing, or any infectious substances, which can directly or indirectly injure or cause disease or damage in any plants or parts thereof, or any processed, manufactured, or other products of plants.

(d) "Living state" includes the egg, pupal, and larval stages as well as any other living stage.

(e) "United States" means any of the States, Territories, or Districts (including possessions and the District of Columbia) of the United States.

(f) "Interstate" means from one State, Territory, or District (including possessions and the District of Columbia) of the United States into or through any other such State, Territory, or District.

(g) "Move" means ship, deposit for transmission in the mail, otherwise offer for shipment, offer for entry, import, receive for transportation, carry, or otherwise transport, or move, or allow to be moved, by mail or otherwise.

(h) "Plant Quarantine Act" means the Act of August 20, 1912 (37 Stat 315), as from time to time amended.

(i) "Mexican Border Act" means the Act of January 31, 1942 (56 Stat 40), as from time to time amended.

7 U.S.C. § 161 Interstate quarantine; shipments or removals from quarantined localities forbidden; regulations by Secretary for shipment, etc., from quarantined localities; notice and hearings; promulgation

The Secretary of Agriculture is authorized and directed to quarantine any State, Territory, or District of the United States, or any portion thereof, when he shall determine that such quarantine is necessary to prevent the spread of a dangerous plant disease or insect infestation, new to or not theretofore widely prevalent or distributed within and throughout the United States. No person shall ship or offer for shipment to any common carrier, nor shall any common carrier receive for transportation or transport, nor shall any person carry or transport from any quarantined State or Territory or District of the United States, or from any quarantined portion thereof, into or through any other State or Territory or District, any class of nursery stock or any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products, or any class of stone or quarry products, or any other article of any character whatsoever, capable of carrying any dangerous plant disease or insect infestation, specified in the notice of quarantine except as hereinafter provided. It shall be unlawful to move, or allow to be moved, any class of nursery stock or any other class of plants, fruits, vegetables, roots, bulbs, seeds or other plant products, or any class of stone or quarry products or any other article of any character whatsoever, capable of carrying any dangerous plant disease or insect infestation, specified in the notice of quarantine hereinbefore provided, and

regardless of the use for which the same is intended, from any quarantined State or Territory or District of the United States or quarantined portion thereof, into or through any other State or Territory or District, in manner or method or under conditions other than those prescribed by the Secretary of Agriculture. It shall be the duty of the Secretary of Agriculture, when the public interests will permit, to make and promulgate rules and regulations which shall permit and govern the inspection, disinfection, certification, and method and manner of delivery and shipment of the class of nursery stock or of any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products, or any class of stone or quarry products, or any other article of any character whatsoever, capable of carrying any dangerous plant disease or insect infestation, specified in the notice of quarantine hereinbefore provided, and regardless of the use for which the same is intended, from a quarantined State or Territory or District of the United States, or quarantined portion thereof, into or through any other State or Territory or District: Provided, That before the Secretary of Agriculture shall promulgate his determination that it is necessary to quarantine any State, Territory, or District of the United States, or portion thereof, under the authority given in this section, he shall, after due notice to interested parties, give public hearing under such rules and regulations as he shall prescribe, at which hearing any interested party may appear and be heard, either in person or by attorney: Provided further, That until the Secretary of Agriculture shall have made a determination that such a quarantine is necessary and has duly established the same with reference to any dangerous plant disease or insect infestation, as hereinabove provided, nothing in this chapter shall be construed to prevent any State, Territory, Insular Possession, or District from promulgating, enacting, and enforcing any quarantine, prohibiting or restricting the transportation of any class of nursery stock, plant, fruit, seed, or other product or article subject to the restrictions of this section, into or through such State, Territory, District, or portion thereof, from any other State, Territory, District, or portion thereof, when it shall be found, by the State, Territory, or District promulgating or enacting the same, that such dangerous plant disease or insect infestation exists in such other State, Territory, or District or portion thereof: Provided further, That the Secretary of Agriculture is authorized, whenever he deems such action advisable and necessary to carry out the purposes of this chapter, to cooperate with any State, Territory, or District, in connection with any quarantine, enacted or promulgated by such State, Territory, or District, as specified in the preceding proviso: Provided further, That any nursery stock, plant, fruit, seed, or other product or article, subject to the restrictions of this section, a quarantine with respect to which shall have been established by the Secretary of Agriculture under the provisions of this chapter shall, when transported to, into, or through any State, Territory, or District, in violation of such quarantine, be subject to the operation and effect of the laws of such State, Territory, or District, enacted in the exercise of its police powers, to the same extent and in the same manner as though such nursery stock, plant, fruit, seed, or other product or article had been produced in such State, Territory, or District, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

7 U.S.C. § 162. Rules and regulations

The Secretary of Agriculture shall make and promulgate such rules and regulations as may be necessary for carrying out the purposes of this chapter.

21 U.S.C. § 111. Regulations to prevent contagious diseases

The Secretary of Agriculture shall have authority to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals and/or live poultry from a foreign country into the United States or from one State or Territory of the United States or the District of Columbia to another, and to seize, quarantine, and dispose of any hay, straw, forage, or similar material, or any meats, hides, or other animal products coming from an infected foreign country to the United States, or from one State or Territory or the District of Columbia in transit to another State or Territory or the District of Columbia whenever in his judgment such action is advisable in order to guard against the introduction or spread of such contagion.

21 U.S.C. § 120. Regulation of exportation and transportation of infected livestock and live poultry

In order to enable the Secretary of Agriculture to effectually suppress and extirpate contagious pleuropneumonia, foot-and-mouth disease, and other dangerous contagious, infectious, and communicable diseases in cattle and other livestock and/or live poultry, and to prevent the spread of such diseases, he is authorized and directed from time to time to establish such rules and regulations concerning the exportation and transportation of livestock and/or live poultry from any place within the United States where he may have reason to believe such diseases may exist into and through any State or Territory, and into and through the District of Columbia and to foreign countries as he may deem necessary, and all such rules and regulations shall have the force of law.

21 U.S.C. § 122. Offenses; penalties

Any person, company, or corporation knowingly violating the provisions of this Act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment. Any person, company, or corporation violating such provisions, orders, or regulations may be assessed a civil penalty by the Secretary of Agriculture of not more than one thousand dollars. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of Title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

Pertinent Sections of Applicable Regulations

Subpart Fruits and Vegetables

Quarantine

7 C.F.R. § 319.56.

(a) The fact has been determined by the Secretary of Agriculture, and notice is hereby given; (1) That there exists in - - - Mexico - - - certain injurious insects including fruit and melon flies - - - which affect and may be carried by fruits and vegetables - - - -.

(b) The Secretary of Agriculture, under authority conferred by the Act of Congress approved August 20, 1912 (37 Stat. 315; 7 U.S.C. 151-167) does hereby declare that it is necessary, in order to prevent the introduction into the United States of certain injurious insects, including fruit and melon flies (Pephritidae), to forbid, except as provided in the rules and regulations supplemental hereto, the importation into the United States of fruits and vegetables from the foreign countries and locations named - - - -.

7 C.F.R. § 319.56-1. Definitions

(a) Fruits and vegetables. The edible, more or less, succulent, portions of food plants in the raw or unprocessed state, such as bananas, oranges, grapefruit, pineapples, tomatoes, peppers, lettuce, etc.

Part 320, Mexican Border Regulations

7 C.F.R. § 320.2. Regulated vehicles, articles, and materials

To carry out the purpose of the aforesaid act to prevent the introduction of insect pests and plant diseases the regulations in this part shall apply to railway cars, boats crossing the Rio Grande, aircraft, drawn or self-propelled vehicles (such as wagons, carts, trucks, automobiles) - - - -.

7 C.F.R. § 320.4. Inspection

As a condition of entry into the United States from Mexico all articles and materials designated in § 320.2 shall be subject to examination by an inspector for the purpose of determining whether they may enter the United States without risk of introducing insect pests and plant diseases.

7 C.F.R. § 320.6. Vehicles, articles, and materials, other than railway cars and unregulated boats

- - - - If the examination by the inspector discloses such regulated vehicles, articles, or material are contaminated and would involve risk of introducing insect pests or plant diseases into the United States, he should prescribe, as a condition of entry, cleaning, transfer of cargo, or disinfection, or any or all of these. The cleaning, transfer of cargo and disinfection shall be carried out under his supervision and to his satisfaction, and until it has been so accomplished, entry into the United States shall be refused.

7 C.F.R. § 321. Subpart-Foreign Potatoes

7 C.F.R. § 321.1. Order

– – – – potatoes imported or offered for import into the United States shall be subject to all the provisions of sections 1, 2, 3 and 4 of said Act of Congress.

7 C.F.R. § 321.4(a).

Persons contemplating the importation of potatoes shall first make application to the Plant Protection and Quarantine Programs, Department of Agriculture, Washington, D.C. 20250, for a permit – – – –.

7 C.F.R. § 94.6. Carcasses of poultry, game birds and other birds, parts of products thereof, eggs and other than hatching eggs: restrictions, exceptions.

9 C.F.R. 6(a)(1).

Viscerotropic velogenic Newcastle disease is considered to exist in all countries of the world except those listed in paragraph (a)(2) of this section.

9 C.F.R. § 6(a)(2)

(Mexico is not listed as an excepted country).

9 C.F.R. § 94.6(g).

Except as provided in paragraph (h) of this section, eggs, other than hatching eggs of poultry, game birds, and other birds originating in or transiting an infected country may be imported only if:

(1) – – – accompanied by a certificate – – –

9 C.F.R. § 94 6(f).

Eggs other than hatching eggs of poultry, game birds, and other birds, originating in and shipped directly from a country listed in paragraph (a)(2) of this section are exempt from the requirements of this section.

9 C.F.R. § 94.6(h).

Eggs, other than hatching eggs of poultry, game birds, and other birds, which do not qualify under paragraphs (f) or (g) of this section may be permitted entry in specific cases by the Deputy Administrator, Veterinary Services, upon application to him if: – – – – –.

In re: MRS. HONG REED.

P.Q. Docket No. 295.

Decision and order filed June 4, 1987.

Movement of jackfruit from Hawaii into the continental United States—Civil penalty—Default.

Lori Monfort, for complainant.

Respondent, pro se.

Decision issued by Edward H. McGrail, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151–164a and 167) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent violated Subpart 318.13 of the regulations promulgated under the Act (7 C.F.R. Subpart 318.13). A copy of the complaint and the rules of practice governing proceedings under the Act were served by certified mail on respondent by the Hearing Clerk on December 7, 1986.

Respondent was informed in the complaint and in the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after receipt of the complaint, that failure to deny, otherwise respond or plead specifically to any allegation in the complaint would constitute an admission of such allegation, and that failure to file an answer within the prescribed time would constitute an admission of the allegations in the complaint and waiver of hearing. The letter of service also advised respondent that failure to request an oral hearing within the time for filing an answer would constitute a waiver of an oral hearing. Respondent has failed to respond in any manner to allegations in the complaint and has failed to request an oral hearing.

Respondent's failure to file an answer within the time prescribed by section 1.136(a) of the rules of practice (7 C.F.R. § 1.136(a)) constitutes an admission of the allegations in the complaint pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)) and a waiver of hearing pursuant to section 1.139 of the rules of practice (7 C.F.R. § 1.139). Because no basis for a hearing exists, the material allegations of fact in the complaint are adopted as set forth as the Findings of Fact.

Findings of Fact

1. Mrs. Hong Reed, respondent, is an individual whose address is 1414 West McFadden, Santa Ana, California 92704.

2. On or about June 6, 1986, respondent moved a jackfruit from Hawaii to California in violation of section 318.13–2 of the regulations (7 C.F.R. § 318.13–2). Under section 318.13–2, jackfruit is not permitted to be moved from Hawaii into the continental United States.

Conclusions

Respondent has failed to respond in any manner to the allegations of the complaint. By reason of the Findings of Fact set forth above, respondent has violated the Act and the regulations promulgated thereunder. Therefore, the following order is issued.

Order

Respondent Mrs. Hong Reed is hereby assessed a civil penalty of two hundred fifty dollars ($250), which shall be payable to the "Treasurer of the United States," by certified check or money order, and which shall be sent to "USDA, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403," within thirty (30) days from the effective date of this order. Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 295.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent unless respondent appeals to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This decision and order became final July 22, 1987.—Editor.]

CONSENT DECISIONS ISSUED

JULY 1987

(Not published herein.—Editor)

Animal Quarantine and Related Laws

WEAVER, LLOYD HOWARD. A.Q. Docket No. 303. July 23, 1987.

Animal Welfare Act

FEDECHKO, GREGORY, d/b/a SOUTH JERSEY BIOLOGICAL FARMS. AWA Docket No. 272. July 10, 1987.

RANKIN, MARY. AWA Docket No. 389. July 13, 1987.

SEALAND OF CAPE COD, INC. AND GEORGE KING. AWA Docket No. 408. July 24, 1987.

TOMS, LESTER, d/b/a RUTHERFORD COUNTY ZOO. AWA Docket No. 423. July 10, 1987.

TRANSUE, ART AND MARILYN. AWA Docket No. 412. July 6, 1987.

Horse Protection Act

CLARK, JAMES FRANK, AND DAVID H. WALLACE. HPA Docket No. 192. Decision as to James Frank Clark, July 13, 1987. Decision as to David H. Wallace. July 13, 1987.

Packers and Stockyards Act

AMUNDSON, S. J., AND MARK T. AMUNDSON. P&S Docket No. 6871. July 16, 1987.

CARTER VALLEY MEAT COMPANY, INC. AND BILLY JOE BROOKS. P&S Docket No. 6892. July 15, 1987.

CLARK LIVESTOCK SALES, INC. P&S Docket No. 6784. July 30, 1987.

MACON LIVESTOCK MARKET, INC. AND GLYN COLEY. P&S Docket No. 6781. July 9, 1987.

METCALF, WELZIE HARRISON, JERRY BEY, HAMILTON MEATS, INC., AND WILLIAM E. HAMILTON. P&S Docket No. 6899. Decision as to Welzie Harrison Metcalf and Jerry Bey. July 15, 1987.

M&R LIVESTOCK, INC., WARREN H. SHRUM, LOUIS J. WENDLING, ROY B. BARKDULL, JR., AND JOE L. BARKDULL. P&S Docket No. 6744. Decision as to Warren H. Shrum. July 29, 1987.

NARROWS LIVESTOCK AUCTION MARKET, INC., PHILLIP MORRIS, W.W. BENNETT HURT, MICHAEL C. EDWARDS, JOE JONES, JACK D. DICK-ERSON, KENNETH C. HALE, AND GLEN H. PRICE. P&S Docket No. [illegible] Decision with respect to Jack D. Dickerson, July 1, 1987. [illegible] respect to Joe Jones, July 15, 1987.

Packers and Stockyards Act. (Cont.)

OZARK COUNTY CATTLE COMPANY, INC., DWIGHT LEDBETTER, LEDBETTER LAND AND CATTLE COMPANY, INC., AND H. H. LEDBETTER; NATIONAL ORDER BUYING CO. OF ST. JOSEPH, MISSOURI, AND THOMAS D. RUNYAN; DIXIE NATIONAL STOCKYARDS, INC., ABRAHAM CATTLE COMPANY, INC., AND DR. LEROY ABRAHAM, AND JEFFREY JACKSON. P&S Docket No. 6743. Decision with respect to Ledbetter Land and Cattle Company, Inc., and H. H. Ledbetter. July 15, 1987.

RADER, WESLEY G., III. P&S Docket No. 6843. July 13, 1987.

STURGEON, JACK. P&S Docket No. 6895. July 17, 1987.

TALLY, THOMAS M. P&S Docket No. 6902. July 27, 1987.

TINA LIVESTOCK AUCTION, INC., TINA FEEDER PIGS, INC., TRIPLE T CATTLE CO , BOYD SIMONS, AND CRAIG SIMONS. P&S Docket No. 6811. July 13, 1987.

WEINBERG, THOMAS B. P&S Docket No. 6884. July 13, 1987.

Potato Research And Promotion Act

WARNKE, HERMAN AND DENNIS. PRPA Docket No. D-2. July 27, 1987.

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